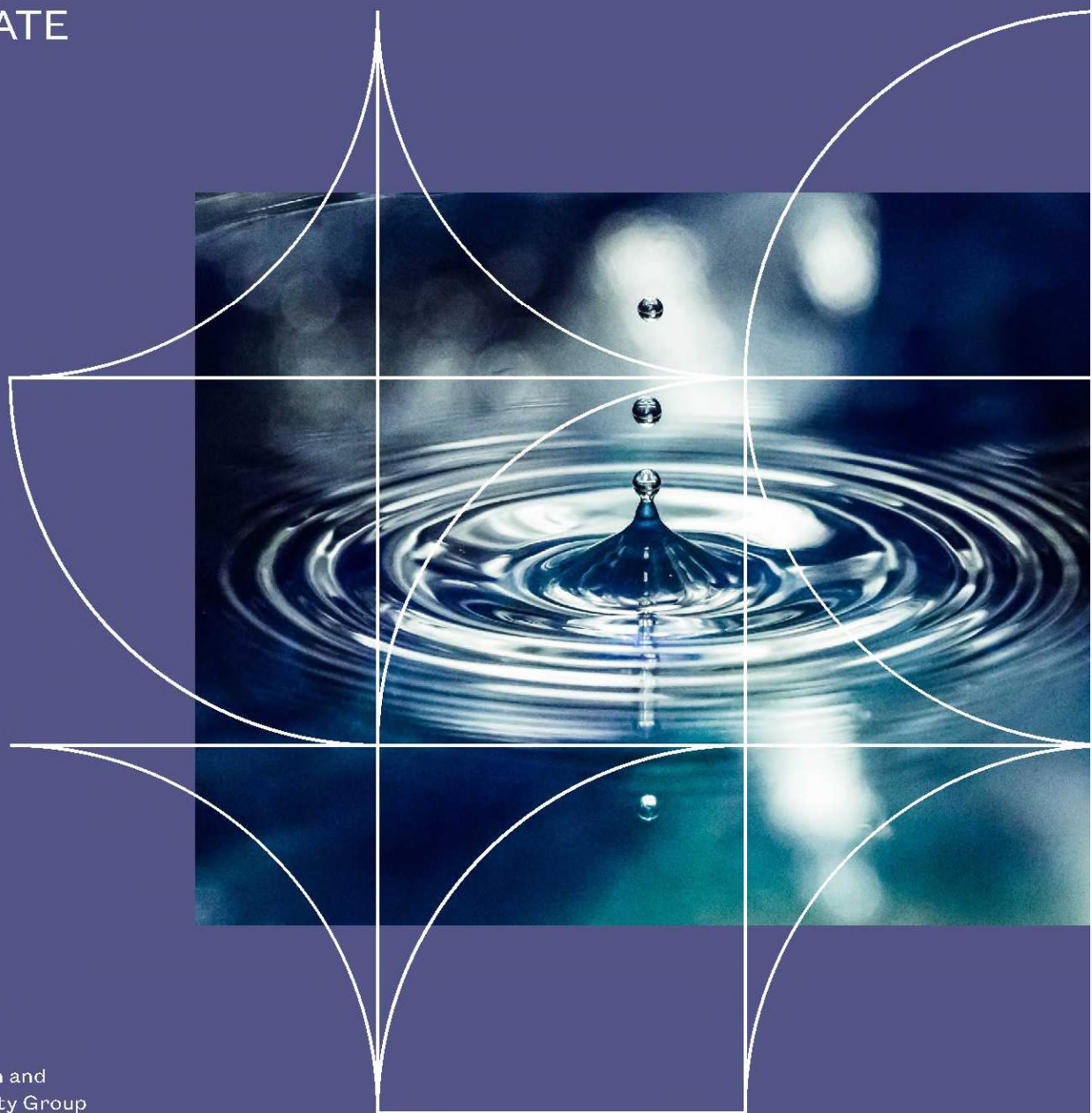




# Developments in Equal Pay Litigation

2020 UPDATE



By Matthew J. Gagnon and  
the Seyfarth Pay Equity Group



# Developments in Equal Pay Litigation

April 2020

Dear Clients and Friends;

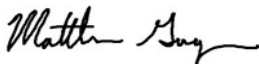
We are pleased to provide you with the latest edition of Seyfarth Shaw's annual analysis of developments in equal pay litigation. This publication provides an overview of significant decisions and recent developments impacting federal and state equal pay litigation and legislation. Our goal is to provide in-depth analysis and commentary regarding those developments so that corporate counsel, human resources professionals, and other corporate decision makers have the up-to-date guidance they need to make informed decisions regarding equal pay issues, including a solid background in the types of issues that often come up when confronting equal pay litigation.

This report is divided into three main sections. The first section discusses equal pay litigation at both the federal and state level, with a special emphasis on how those various legal and regulatory regimes differ and the different legal risks they pose to employers operating in many jurisdictions. The second section contains an in-depth discussion of significant recent court decisions impacting equal pay litigation, including substantive trends and developments in the legal theories and defenses advanced by plaintiffs and employers. The third section discusses significant developments in federal regulation and enforcement of equal pay issues led by the Equal Employment Opportunity Commission. Pay equity continues to be one of its top enforcement priorities and a significant legal risk for employers.

We hope that our clients and friends will find this reference useful as they navigate these rapidly developing legal issues. Please feel free to contact the author, Matthew J. Gagnon [mgagnon@seyfarth.com](mailto:mgagnon@seyfarth.com), or any member of Seyfarth Shaw's Pay Equity Group, with any questions.



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# OUR PAY EQUITY PRACTICE

We combine legal expertise with industry-leading statistical capabilities to provide global pay equity solutions that assess and mitigate risk.

Pay equity is at the forefront of legal issues facing employers today. New equal pay, transparency, and reporting laws within the United States and across the globe present new risks and opportunities for employers.

Seyfarth's dedicated Pay Equity Group offers a strategic and data-centered approach to pay equity compliance. Our attorneys, in-house labor economists and data analysts make complex statistical analyses simple to understand. Seyfarth's deep knowledge of the pay laws and commitment to innovation gives us the tools to help you operationalize pay equity programs and minimize the risk of litigation. If disputes cannot be avoided, Seyfarth leads in managing complex bet-the-company pay equity claims and single-plaintiff litigation.

## HOW WE HELP

Seyfarth has more than 20 years of experience handling all aspects of pay equity issues, including counseling employers on best practices across the globe.

- We conduct proactive assessments of compensation using a privileged framework.
- We work with employers to craft appropriate remedial measures to mitigate future risks that have been identified during the proactive analysis.
- We conduct high-profile investigations related to complaints of pay discrimination.
- We work with employers interested in communicating to customers, communities, and employees that they care about pay equality.
- When necessary, we bring our unique experience to defend employers in high-stakes pay equity litigation.
- Seyfarth also spearheads employer advocacy around pay equity. Our unparalleled thought leadership and advocacy has included comments and testimony before the US House of Representatives, the US Senate, and various administrative agencies such as the EEOC and OFCCP.



## **TABLE OF CONTENTS**

EQUAL PAY LEGISLATION .....	1
A.    Federal Equal Pay Act.....	1
B.    State Equal Pay Legislation .....	1
C.    State And Local Salary History Bans .....	3
CASE LAW DEVELOPMENTS IN 2019 AND EARLY 2020 .....	5
A.    Proving The Prima Facie Case .....	5
1.    Establishing A Wage Disparity.....	6
2.    Showing That Work Is “Equal” Or “Substantially Similar” .....	10
B.    Significant Class And Collective Action Decisions.....	14
C.    Disproving Discrimination: Employers’ Affirmative Defenses .....	20
1.    Proving A Factor Other Than Sex.....	21
2.    The Use Of Salary History As A Legitimate Factor Other Than Sex.....	23
3.    Other Affirmative Defenses.....	28
4.    Pretext.....	29
D.    Other Important Substantive Decisions Impacting Pay Equity Litigation.....	31
1.    Retaliation Claims: Establishing The Causal Link .....	31
2.    Arbitration Agreements .....	32
3.    Proving An “Establishment” .....	35
4.    Who Is An “Employer” Under The EPA? .....	36
DEVELOPMENTS IN EEOC ENFORCEMENT OF EQUAL PAY ACT CLAIMS.....	39
A.    EEO-1 Reporting Requirements .....	39
B.    Case Law Developments .....	42





# EQUAL PAY 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 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.<sup>2</sup> 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.<sup>3</sup>

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 the six enforcement priorities in its Strategic Enforcement Plan.<sup>4</sup> Although the number of filings under the EPA make up a relatively small percentage of the EEOC’s docket, agency personnel have repeatedly reaffirmed its importance as an enforcement priority for the EEOC.

This publication addresses significant developments in equal pay litigation under the federal EPA and similar state laws. Although there is an emphasis on the most recent decisions from 2019 and early 2020 in order to provide an up-to-date snapshot of the current state of the case law, the primary aim of this publication is to identify and discuss significant developments in the law, some of which may take several years to mature. 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 were the

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<sup>1</sup> 29 U.S.C. § 206(d)(1).

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

<sup>3</sup> On December 6, 2019, the Second Circuit Court of Appeals clarified an important substantive difference between these statutes. In *Lenzi v. Systemax, Inc.*, 944 F.3d 97 (2d Cir. 2019), the plaintiff had alleged violations of the EPA and Title VII related to the setting of her compensation. The District Court for the Eastern District of New York dismissed her claims, holding that Plaintiff’s Title VII claims, like claims brought under the EPA, required her to show “positions held by her purported male comparators [were] substantially equal to her position.” *Id.* at 108 (internal citations omitted). Plaintiff could not make this showing because she was the only employee who held her job title and duties, so her Title VII claims were dismissed. The Second Circuit acknowledged that one of its opinions from 1995, which held that “[a] claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim,” is commonly used by district courts in their analyses of Title VII pay discrimination claims. *Id.* at 109 (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995)). The court expressed a desire to “take this opportunity to clarify that a Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay,” as is required by the EPA. *Id.* at 110. While affirming that a plaintiff could bring a claim for equal work for unequal pay under Title VII if they could show a discriminatory animus behind the pay determination, the court emphasized that such a claim was not the *only* kind of Title VII claim available related to pay. The court concluded its holding by reiterating that “all Title VII requires a plaintiff to prove is that her employer ‘discriminate[d] against [her] with respect to [her] compensation . . . because of [her] . . . sex.’” *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)). Discriminatory pay claims can be brought successfully under Title VII even if the plaintiff cannot show a purported comparator of the opposite sex earning a higher wage (provided that the challenged pay rate is not based on seniority, merit, quantity or quality of production, or any other factor besides sex).

<sup>4</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>.

first states to adopt more onerous pay equity laws in the last few years.<sup>5</sup> Other states soon followed. State equal pay laws differ from the federal EPA in significant ways. For example, on January 1, 2016, the California Fair Pay Act,<sup>6</sup> became effective for all employers with California-based employees. It expands upon the protections offered by the federal EPA and Title VII, as well as already-existing California law.<sup>7</sup> Importantly, the California Fair Pay Act allows employees to be compared even if they do not work at the same establishment.<sup>8</sup> 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.<sup>9</sup>

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."<sup>10</sup> The Massachusetts Equal Pay Act prohibits differences in pay for "comparable work."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</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>15</sup> The New York law includes a similar provision. These anti-pay secrecy

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<sup>5</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>6</sup> Cal. Lab. Code § 1197.5.

<sup>7</sup> For more information about the California Fair Pay Act and some other early 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](http://www.seyfarth.com/dir_docs/publications/PayEquityBrochure.pdf).

<sup>8</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."

<sup>9</sup> NY Lab. Law §§ 194 et seq.

<sup>10</sup> Cal. Lab. Code § 1197.5(b).

<sup>11</sup> Mass. Gen. Laws. c. 149 § 105A.

<sup>12</sup> *Id.*

<sup>13</sup> Cal. Lab. Code § 1197.5(h), (i).

<sup>14</sup> *Id.* § 1197.5(e).

<sup>15</sup> *Id.* § 1197.5(k)(1).

requirements echo similar prohibitions under the National Labor Relations Act, the California Labor Code, and an Executive Order that applies to federal contractors.

## C. State And Local 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. Similar laws are currently under consideration in other jurisdictions.

State and local salary history bans have sometimes been vigorously opposed by various business groups. On February 6, 2020, the U.S. Court of Appeals for the Third Circuit decided *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*,<sup>16</sup> which rejected a number of arguments against those bans. The lawsuit involved the 2017 Philadelphia Wage Equity Ordinance, which, among other things, prohibits employers from inquiring into or relying upon job applicants' prior wage history in establishing starting pay. The Ordinance consisted of two provisions: the "Inquiry Provision" and the "Reliance Provision." The Inquiry Provision prohibits an employer from asking about a prospective employee's wage history, and the Reliance Provision prohibits an employer from relying on wage history at any point in the process of setting or negotiating a prospective employee's wage.

The Ordinance was challenged in federal district court on constitutional grounds on the basis that it infringes upon employers' freedom of speech. The district court invalidated the Inquiry Provision, holding that it violated the First Amendment because it could not withstand even the less stringent analysis under intermediate scrutiny.<sup>17</sup> But because the Reliance Provision targets conduct rather than speech, the district court held that no First Amendment analysis was required and such provision was upheld.<sup>18</sup>

Initially, the Third Circuit agreed with the district court that the Reliance Provision does not regulate speech, as it does not implicate the spoken or written word. Further, the Third Circuit held that: (1) the provision leaves employers free to discuss an applicant's value by his or her qualifications; (2) the provision does not impede on free speech as it is not triggered during negotiation of an employment contract but is triggered "at any stage in the employment drafting process"; (3) even if the provision is triggered by negotiations, its "incidental impact" on speech is not an unconstitutional violation of the freedom of speech; and (4) the provision is distinguishable from other cases involving laborers' abilities to advertise their availability for work because that is "prototypical speech that depends on spoken or written communication."<sup>19</sup>

Regarding the Inquiry Provision, the Third Circuit initially agreed with the district court in finding that the regulated expression is "commercial speech" because the affected communications occur in the context of employment negotiations, which propose a commercial transaction where "the economic motive is clear."<sup>20</sup> Recognizing that "the Supreme Court has consistently applied intermediate scrutiny to commercial speech restrictions . . . particularly when the challenged speech involves an offer of employment," the Third Circuit rejected the application of strict scrutiny.<sup>21</sup>

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<sup>16</sup> *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020).

<sup>17</sup> *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, 319 F. Supp. 3d 773, 785 (E.D. Pa. 2018).

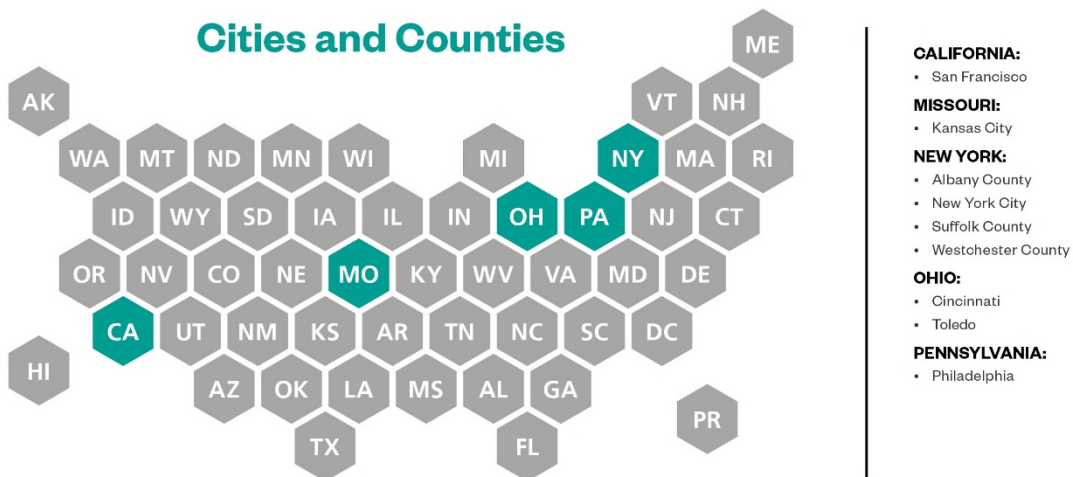
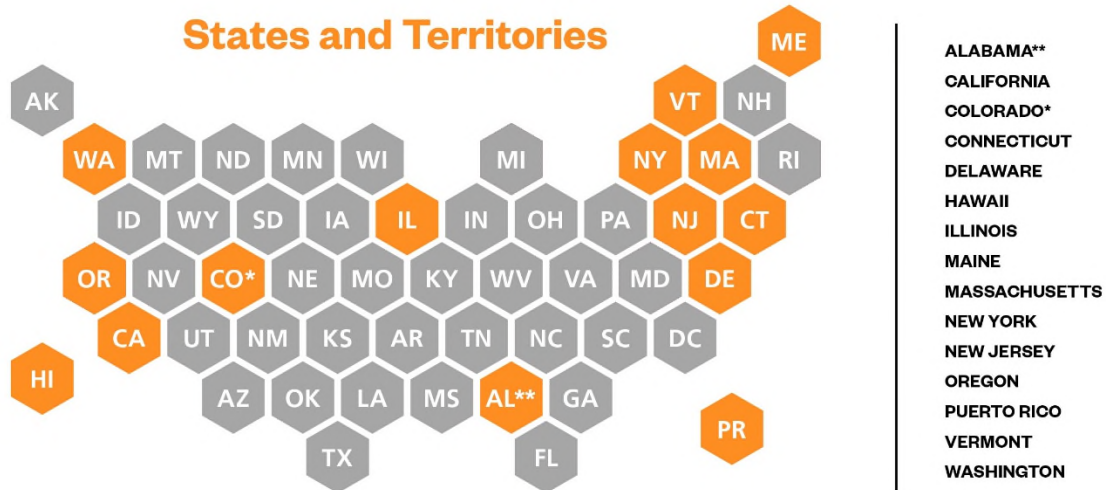
<sup>18</sup> *Id.* at 801, 803.

<sup>19</sup> *Greater Philadelphia*, 949 F.3d at 136.

<sup>20</sup> *Id.* at 137.

<sup>21</sup> *Id.* at 138. The Third Circuit therefore applied an intermediate scrutiny standard, which required it to analyze the following factors: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest. *Id.*

# State & Local Salary History Bans



The Third Circuit then held that the regulated speech is not related to illegal activity because not all uses of wage history are illegal. The court also agreed that solving the pay gap is a substantial government interest and that the provision directly advances that interest, finding that the City Council relied upon sufficient testimony and studies to support the enactment of the Ordinance, including that: (1) the wage gap is substantial and real; (2) numerous experiments have been conducted, which controlled for such variables as education, work experience, and academic achievement, still finding a wage gap; (3) researchers have long attributed the gap to discrimination; (4) existing civil rights laws have been inadequate to close the wage gap; and (5) witnesses who reviewed the data concluded that relying on wage history can perpetuate gender and race discrimination.<sup>22</sup> Finally, the Third Circuit determined that the Inquiry Provision is not more extensive than necessary because it is narrowly tailored to only prohibit employers from inquiring about the single topic of wage history to preclude any discriminatory impact of prior salary levels. Employers are free to ask “a wide range of other questions,” including those related to qualifications, work history, skills and any other job-related questions relevant to performance or fit with the company and may still obtain market salary information from other sources.<sup>23</sup>

The Third Circuit’s holding and reasoning in *Greater Philadelphia* is significant, not just because it upheld one locality’s ordinance, but because it did so based on many of the arguments and analyses that underlie the rationale for salary history bans generally, including the alleged scientific bases of a “wage gap” and the purported failure of existing anti-discrimination legislation to address that issue. If the Third Circuit’s decision is any guide to the future, salary history bans will continue to be an important factor in employers’ hiring decisions.

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.”<sup>24</sup>

## CASE LAW DEVELOPMENTS IN 2019 AND EARLY 2020

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 type of litigation have been companies in the health, education, finance, legal, and technology industries. Those cases continue to reshape 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.

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<sup>22</sup> *Id.* at 143.

<sup>23</sup> *Id.* at 154-55.

<sup>24</sup> See Seyfarth Shaw Pay Equity Group, *50 State Pay Equity Desktop Reference: What Employers Need To Know About Pay Equity Laws, 2019 Q4 Edition*, available at <https://www.seyfarth.com/images/content/5/4/v2/54844/50-State-Pay-Equity-Desktop-Reference-RPT-Q4-Digital-M4.pdf>.

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 for the same work. 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.

This requirement is often not difficult to meet. Courts often hold that a prima facie case has been established if there is just one member of the opposite sex that is paid more, even where the plaintiff is better paid than most other comparable employees of the opposite sex. In *Gutierrez v. City of Converse*,<sup>25</sup> the District Court for the Western District of Texas underlined the minimal showing required of a plaintiff to establish a prima facie case of wage discrimination. In that case, a firefighter was terminated after allegedly leaving the scene of a critically ill patient without being cleared to do so. She filed suit, alleging, among other things, retaliation and sex-based pay discrimination under the EPA.<sup>26</sup> The court acknowledged that the summary judgment evidence showed that plaintiff was better paid than all of her male peers with the exception of one.<sup>27</sup> However, just one such pay disparity is enough to establish a prima facie case under the EPA. The court concluded that “the plaintiff need not prove that she was paid less than every comparable male employee. It is enough for the plaintiff to show that there is discrimination in pay with respect to one employee of the opposite sex.”<sup>28</sup>

Other courts, however, have pointed to the fact that members of the opposite sex were paid more as tending to disprove the existence of discrimination. For example, in *Jones v. Jefferson City Public Schools*,<sup>29</sup> the District Court for the Western District of Missouri held that plaintiff had failed to establish a wage disparity due to his admission that both male and female comparators were paid more than him. In that case, a Credit Recovery Supervisor for a city school district alleged that he was paid as an aide, rather than as a certified teacher, even though his position required at least 60 hours of college credit and a substitute teaching certificate.<sup>30</sup> Plaintiff based his EPA claim on a comparison of his job to the duties

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<sup>25</sup> *Gutierrez v. City of Converse*, No. 5:17-CV-1233-JKP, 2020 WL 156707 (W.D. Tex. Jan. 10, 2020).

<sup>26</sup> *Id.* at \*1.

<sup>27</sup> *Id.* at \*3.

<sup>28</sup> *Id.* (quoting *Lenihan v. Boeing Co.*, 994 F. Supp. 776, 799 (S.D. Tex. 1998)).

<sup>29</sup> *Jones v. Jefferson City Pub. Sch.*, No. 2:1-CV-4054, 2019 WL 1118557 (W.D. Mo. Mar. 11, 2019).

<sup>30</sup> *Id.* at \*1.

and salaries of all female teachers at the city high school.<sup>31</sup> However, he conceded that both male and female teachers were paid more than him. The district court held that this admission was fatal to plaintiff's claim because "if sex-based discrimination is not the reason for disparity in pay, the disparity cannot form the basis of a claim under the Equal Pay Act."<sup>32</sup>

A pay disparity also does not have to be based on the wage or salary components of compensation. For example, in *Perdue v. Rockydale Quarries Corp.*,<sup>33</sup> the District Court for the Western District of Virginia held that a difference in how a company distributes benefits is sufficient to establish a wage disparity. In that case, a female supervisor alleged that she was denied equal pay because her male predecessor in the same position, as well as other male supervisors, had been provided a benefits package that included the use of a company vehicle for business travel and his commute to work.<sup>34</sup> She, on the other hand, was offered a benefits package that only allowed her the use of a company vehicle for business travel.<sup>35</sup> The court held that this was sufficient to allege a claim under the EPA: "While [employer] may ultimately disprove these allegations or establish that the alleged disparity was justified by a reason other than gender, the court concludes that the allegations are sufficient to withstand the defendant's motion to dismiss."<sup>36</sup>

Relying on other, less clear-cut bases of compensation can, however, create problems of proof for aspiring EPA plaintiffs. For example, in *Williamson v. Digital Risk, LLC*,<sup>37</sup> the District Court for the Middle District of Florida dismissed an EPA claim even after plaintiff had introduced evidence of intentional discrimination with respect to wages on the basis of sex. In that case, a female senior operations manager alleged a variety of intentional discrimination claims, including sex harassment, along with a wage discrimination claim under the EPA. The court refused to dismiss the intentional discrimination claims, including a claim under Title VII, because plaintiff had introduced direct evidence of intentional discrimination: "according to the Plaintiff's sworn declaration, [Plaintiff's supervisor] directly told her that he was taking away her accounts because leadership believed she was making too much money as a female."<sup>38</sup> However, turning to the EPA claim, the court held that although the plaintiff had pointed to comparator employees, she had failed to produce evidence that male employees were entitled to a larger percentage of commissions than she received.<sup>39</sup> The court concluded: "Plaintiff has not argued, much less shown, that the male employees were in fact paid more than her."<sup>40</sup>

Similarly, in *Wentzel v. Williams Scotsman Inc.*,<sup>41</sup> the District Court for the District of Arizona granted summary judgment in favor of an employer that was able to establish the plaintiff was actually paid more than her alleged comparator. In that case, the plaintiff was the only female Account Executive employed at a modular office space provider.<sup>42</sup> Her comparator was the only other Account Executive working at the same office, who was male. Although the court held that the plaintiff had established that the work of the two Account Executives was "substantially equal," summary judgment was granted to the employer because it was able to show that plaintiff actually earned more money than her male comparator.<sup>43</sup> The

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*2. The court further held that because plaintiff had admitted that both male and female teachers are paid on the same salary schedule, which is separate from the salary schedule that applied to his position, and that the pay scale for the teachers' salaries is the same for males and females, it would then be impossible for plaintiff to show that his employer paid different salaries to men and women for equal work performed under similar conditions. *Id.*

<sup>33</sup> *Perdue v. Rockydale Quarries Corp.*, No. 7:18-CV-416, 2019 WL 2216527 (W.D. Va. May 22, 2019).

<sup>34</sup> *Id.* at \*1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*6.

<sup>37</sup> *Williamson v. Digital Risk, LLC*, No. 6:18-CV-767-Orl-31EJK, 2020 WL 434954 (M.D. Fla. Jan. 28, 2020).

<sup>38</sup> *Id.* at \*4.

<sup>39</sup> *Id.* at \*5.

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

<sup>41</sup> *Wentzel v. Williams Scotsman Inc.*, No. 18-CV-2101-PHX-SMB, 2020 WL 1158547 (D. Ariz. Mar. 10, 2020).

<sup>42</sup> *Id.* at \*1.

<sup>43</sup> *Id.* at \*3-4.



plaintiff conceded this point, but argued that she had to work significantly harder than her male comparator in a manner that was disproportionate to her additional compensation. The court held that this was not an adequate basis for establishing a pay disparity under the EPA: “[e]ven assuming that [plaintiff] had to work *harder* than [comparator] for her pay, she was still paid *more*. The EPA’s very text precludes a claim under these circumstances.”<sup>44</sup>

In class and collective actions, the identification of a wage disparity can be much more complex. The use of statistics to show disparities in pay across employee groups is often critical in such cases. For example, in *Spencer v. Virginia State University*,<sup>45</sup> the Fourth Circuit affirmed a decision that rejected an attempt by a tenured Associate Professor in the Department of Sociology to use statistics to establish that she was paid less than term-appointed Associate Professors in other departments.<sup>46</sup> The district court had 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.”<sup>47</sup> 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.<sup>48</sup> 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 more than their female counterparts by school.<sup>49</sup> The district 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.”<sup>50</sup>

In 2019, the Fourth Circuit affirmed the district court’s decision.<sup>51</sup> In doing so, the Fourth Circuit noted the unique features of academia that present special challenges for the EPA claimant: “[p]rofessors are not interchangeable like widgets. Various considerations influence the hiring, promotion, and compensation of different professorial jobs.”<sup>52</sup> The Fourth Circuit noted that in the academic context work is an exercise in intellectual creativity that can be judged only according to intricate, field-specific, and often subjective criteria.<sup>53</sup> Accordingly, an EPA plaintiff must provide the court with more than broad generalities to establish their claim.<sup>54</sup> Turning to plaintiff’s expert analysis, the Fourth Circuit held that the expert had failed to identify a general disparity between the pay of men and women at the University: “[h]is efforts revealed no statistically significant disparity within each ‘school.’ If anything, this evidence undermines [plaintiff’s] claimed inference of discrimination.”<sup>55</sup>

In *Bridewell-Sledge v. Blue Cross of California*,<sup>56</sup> the court based its denial of class certification on a close analysis of the parties’ competing expert reports. 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.<sup>57</sup> However, the court held that plaintiffs’

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<sup>44</sup> *Id.* at \*4 (emphasis in original).

<sup>45</sup> *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019).

<sup>46</sup> *Spencer v. Va. State Univ.*, No. 3:16-CV-989-HEH, 2018 WL 627558, at \*8 (E.D. Va. Jan. 30, 2018).

<sup>47</sup> *Id.* at \*9.

<sup>48</sup> *Id.* at \*10.

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

<sup>50</sup> *Id.* (quoting *Stag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 950 (4th Cir. 1995)).

<sup>51</sup> *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019).

<sup>52</sup> *Id.* at 204.

<sup>53</sup> *Id.* at 205.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 206.

<sup>56</sup> *Bridewell-Sledge v. Blue Cross of Cal.*, No. BC477451, 2018 Cal. Super. LEXIS 3879 (Cal. Super. Ct. Aug. 28, 2018).

<sup>57</sup> *Id.* at \*39. 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.” *Id.* at \*26 (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 333 (Cal. 2004)). 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.*



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.<sup>58</sup> The court 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.”<sup>59</sup> 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.’”<sup>60</sup> The court therefore denied class certification.

Similarly, in *Kassman v. KPMG LLP*,<sup>61</sup> 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 Associates, Managers, Senior Managers/Directors, and Managing Directors within the company’s Tax and Advisory Functions from 2009 to the present.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> Rather, the data “reflects a heavier concentration of men in higher compensated units and heavier concentration of women in lesser compensated units.”<sup>65</sup> The court concluded that 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.<sup>66</sup> Moreover, because the employer 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.”<sup>67</sup>

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*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)).

<sup>58</sup> *Bridewell-Sledge*, 2018 Cal. Super. LEXIS 3879, at \*44.

<sup>59</sup> *Id.* at \*47. 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.” *Id.* at \*44-47. 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.” *Id.* at \*45.

<sup>60</sup> *Id.* at \*48.

<sup>61</sup> *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252 (S.D.N.Y. Nov. 30, 2018).

<sup>62</sup> *Id.* at 259.

<sup>63</sup> *Id.* at 263-64.

<sup>64</sup> *Id.* at 265.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 282.

<sup>67</sup> *Id.* at 288. 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*

## 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.”<sup>68</sup> 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.”<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> Some industries are naturally more amenable to this kind of defense than others. For example, in *Freyd v. University of Oregon*,<sup>72</sup> the District Court for the District of Oregon discussed how difficult it can be for plaintiffs to establish the “equal work” requirement within the university setting. In that case, a university professor of psychology alleged that she was paid less than other professors at the same University for performing the same work.<sup>73</sup> Plaintiff had become concerned that the salary inequities in her department were related to gender and, in particular, that her salary was below that of male professors in the same department with less seniority.<sup>74</sup> However, the University decided not to offer her a raise after concluding that she was compensated at a higher rate than the majority of professors in the College of Arts and Sciences and that any discrepancy with respect to her salary versus her male colleagues was attributable to retention raises and significant differences in job duties.<sup>75</sup>

The district court started out by acknowledging the unique complexities that attach to the notion of “equal pay for equal work” in the university setting.<sup>76</sup> The court noted that the nature of the academic setting allowed different professors within the same discipline to choose to follow different paths of knowledge and to pursue endeavors that create different and unique value to the institution.<sup>77</sup> Moreover, a university

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their sex. *Id.* at 271-72. But the court held that this was no bar to relevance because correlation alone “logically advanced Plaintiffs’ case.” *Id.* at 272.

<sup>68</sup> 29 U.S.C. § 206(d)(1)

<sup>69</sup> See Cal. Lab. Code § 1197.5(a).

<sup>70</sup> See, e.g., Md. Code Lab. & Empl. §§ 3-304(b)(1)(i).

<sup>71</sup> 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 claims 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.*

<sup>72</sup> *Freyd v. Univ. of Oregon*, 384 F. Supp. 3d 1284 (D. Or. May 2, 2019).

<sup>73</sup> *Id.* at 1288.

<sup>74</sup> *Id.* at 1289.

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

<sup>76</sup> *Id.* at 1288.

<sup>77</sup> *Id.*

must offer competitive salaries in order to attract top faculty while at the same time maintaining a fair compensation system for all professors.<sup>78</sup> In particular, senior professors and professors who take on introductory courses and devote extra time to advising and other roles that make up the bread and butter of a university education, may be paid according to a pay scale that has not kept up with the market demand that influences how much a university has to pay to attract top talent.<sup>79</sup> The district court then analyzed plaintiff's comparators in detail, holding with respect to each one that the differences in their job duties and other related activities, as well as their frequency and success with respect to the submission of grant applications, justified the salary discrepancies among those professors.<sup>80</sup>

Similarly, in *Miller v. Sam Houston State University*,<sup>81</sup> the District Court for the Southern District of Texas held that a tenure-track Assistant Professor had failed to establish that her job responsibilities were substantially similar to her chosen comparator, another Assistant Professor in the same field. Plaintiff alleged that her salary was less than 90% of that of her male comparator, who was one year behind her on the tenure-track.<sup>82</sup> However, the University had shown that her comparator had elevated job responsibilities because he was a licensed psychologist with clinical supervisory responsibilities.<sup>83</sup> The comparator had obtained his license ten years prior to plaintiff. The University showed that during the time that plaintiff did not have that license, it was required to devote extra resources to assist her, such as assigning a licensed psychologist to help supervise her students.<sup>84</sup> The district court concluded: "[b]ecause [comparator] did not require those extra resources and supervising his students, their work was not equal."<sup>85</sup>

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*,<sup>86</sup> the Eleventh Circuit upheld a decision by the District Court for the Northern District of Alabama holding 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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."<sup>91</sup>

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

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1291-94.

<sup>81</sup> *Miller v. Sam Houston State Univ.*, No. H-15-CV-2824, 2019 WL 4758357 (S.D. Tex. Sept. 30, 2019).

<sup>82</sup> *Id.* at \*9.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

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

<sup>86</sup> *Heatherly v. Univ. of Ala. Bd. of Trs.*, 778 F. App'x 690 (11th Cir. 2019).

<sup>87</sup> *Heatherly v. Univ. of Ala. Bd. of Trs.*, No. 7:16-CV275-RDP, 2018 WL 3439341, at \*5 (N.D. Ala. July 17, 2018).

<sup>88</sup> *Id.* at \*13.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*14.

The Eleventh Circuit agreed with the district court, holding that when evaluating whether a comparator's job is substantially similar, the focus must be on the primary duties of each job, and not on the individual employees holding those jobs or on incidental or insubstantial job duties.<sup>92</sup> The Eleventh Circuit also agreed with the district court in refusing to credit plaintiff's claim that the employer valued all jobs within the same pay grade equally, noting that the salaries within plaintiff's own pay grade ranged widely.<sup>93</sup> Finally, the Eleventh Circuit performed its own side-by-side comparison of plaintiff's job duties versus those of her comparators, and held that she had different job responsibilities and comparatively less responsibility and authority.<sup>94</sup> For example, her comparators had responsibility to manage many times more money than plaintiff, and managed ten or more staff members as opposed to plaintiff's one.<sup>95</sup> Accordingly, the Eleventh Circuit concluded that, "a reasonable juror could not find that [plaintiff] engaged in work that was substantially similar to that performed by her alleged comparators."<sup>96</sup>

However, in *Baker-Notter v. Freedom Forum, Inc.*,<sup>97</sup> the District Court for the District of Columbia held that a company's own internal salary review was sufficient to demonstrate comparability among jobs sufficient to survive a motion to dismiss. In that case, a Senior Director of Operations for a political nonprofit organization in Washington DC alleged various claims against her employer, including under the EPA.<sup>98</sup> The nonprofit moved to dismiss, arguing that plaintiff had utterly failed to plead facts sufficient to show that the skills, effort, and responsibilities required of her position and her alleged male comparators were substantially equal.<sup>99</sup> The district court held that plaintiff's obligation at the motion to dismiss stage was low; she was not required to "show" anything, but only to allege with some plausibility facts sufficient to state a claim for relief.<sup>100</sup> The court held that the complaint pointed to the nonprofit's own salary survey, which was performed for the alleged purpose of uncovering salary discrepancies, and this was sufficient to suggest that the jobs surveyed were at least comparable, which "provides the Court with some idea of what evidence [plaintiff] will present."<sup>101</sup> Although plaintiff would eventually have to show more than just comparability in order to prove that these jobs were in fact substantially similar, as the EPA requires, the court held that "courts should not require so much detail about similarity at the front end of a lawsuit as to make equal pay laws largely inapplicable to this class of employees."<sup>102</sup> Accordingly, the district court denied the employer's motion to dismiss.

Often, there is no way to categorize or divine an overarching explanation for why some jobs are held to be equal, but others are not. The decisions are highly dependent on the facts of each case, and no two are exactly alike. The difference in results often comes down to what facts a plaintiff or an employer can successfully marshal in their favor. For example, in *Galligan v. Detroit Free Press*,<sup>103</sup> the District Court for the Eastern District of Michigan compared the job responsibilities of photographers and reporters in a newsroom. In that case, a group of four photographers and reporters alleged that they were paid less than similarly situated male colleagues because of their sex. The employer had argued that the female photographers work did not involve the same quality, complexity, or independence as the male comparator's work.<sup>104</sup> Among other things, the male comparator was regularly assigned to long-term enterprise pieces and spent more time on video projects, including complex video projects that require more editing, extensive planning, and greater autonomy.<sup>105</sup> However, the court held that because the

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<sup>92</sup> *Heatherly.*, 778 F. App'x at 692.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 692-93.

<sup>95</sup> *Id.* at 693.

<sup>96</sup> *Id.*

<sup>97</sup> *Baker-Notter v. Freedom Forum, Inc.*, No. 18-CV-2499 (RC), 2019 WL 4601726 (D.D.C. Sept. 23, 2019).

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.* at \*9.

<sup>100</sup> *Id.*

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

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

<sup>103</sup> *Galligan v. Detroit Free Press*, No. 17-CV-13349, 2020 WL 475341 (E.D. Mich. Jan. 29, 2020).

<sup>104</sup> *Id.* at \*7.

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

photographer plaintiffs' performance evaluations showed that they were also expected to produce long-term enterprise pieces and video projects, that they had presented substantial evidence that they perform the same duties as the male comparator.<sup>106</sup> Moreover, although the female plaintiffs allegedly spent more time editing photos, the court held that this was not enough to undermine their prima facie case: "given the substantial overlap in overall work performed by [plaintiff and comparator], the one modest difference concerning percentage of time that each of them spent editing photos does not compel a finding, as a matter of law, that [plaintiff and comparator] do not perform equal work."<sup>107</sup>

With respect to the reporter plaintiffs, however, the court held the opposite, finding that they had not satisfied their prima facie case because they had not identified a complete list of the specific job duties of any male reporter.<sup>108</sup> Although plaintiffs had highlighted some duties performed by certain male reporters, the court faulted them for providing only a partial list of duties: "this type of evidence is insufficient to support the required finding that the male reporters' specific duties, as a whole, were substantially the same as the reporter-plaintiffs' specific duties."<sup>109</sup>

In *Kairam v. West Side GI, LLC*,<sup>110</sup> the Second Circuit affirmed the district court's dismissal of an EPA complaint due to plaintiff's failure to plead that her position was substantially equal to her chosen comparator. In that case, a doctor alleged that her employer had failed to pay her a salary for administrative billing work, while paying a male comparator that salary for the same work. The Second Circuit agreed that the plaintiff had failed to allege that her position was substantially equal to her comparator's position due to the paucity of facts alleged in support of that allegation. "The [complaint] alleges details about [plaintiff's] position, including, among other things, that she analyzed patterns to see whether particular doctors were experiencing problems with particular insurers," and "analyzed denials to improve billing procedures."<sup>111</sup> But with respect to her comparator, she merely alleged that he was paid to run a practice that "involved administrative duties at [the same employer]."<sup>112</sup>*Id.*

In *Badgerow v. REJ Properties, Inc.*,<sup>113</sup> the District Court for the Eastern District of Louisiana held that the relative size of an employee's book of business is enough to justify a wage disparity. In that case, a female financial advisor working at a franchise financial advisory firm alleged that she was paid less than other male assistant financial advisors.<sup>114</sup> She was paid on a salary draw plus commission basis, meaning that she had to repay her salary draw by deducting it from commissions earned.<sup>115</sup> She alleged that other male assistant financial advisors were paid on a salary plus commission basis, meaning that they were able to keep their salary on top of their commissions.<sup>116</sup> The court granted summary judgment in favor of the employer, however, because plaintiff's comparators all had significantly more seniority than plaintiff and had significantly larger books of business than plaintiff, who was new to the business.<sup>117</sup> Moreover, those comparators to whom plaintiff was most similar had, in fact, been paid on the same salary draw plus commission basis as plaintiff.<sup>118</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*8.

<sup>108</sup> *Id.* at \*13.

<sup>109</sup> *Id.* The employer also argued that the alleged pay disparity was justified because it was due to a merit pay system. But the court held that plaintiffs had presented evidence that that system was "not 'neutral,' was not governed by any consistent or objective measurement of merit, and did not fairly and consistently reward true merit." *Id.* Among other things, the court noted that testimony from managerial employees was "less than clear about how merit pay raises are determined." *Id.*

<sup>110</sup> *Kairam v. West Side GI, LLC*, 793 F. App'x 23 (2d Cir. 2019).

<sup>111</sup> *Id.* at 26.

<sup>112</sup> *Id.*

<sup>113</sup> *Badgerow v. REJ Properties, Inc.*, 383 F. Supp. 3d 648 (E.D. La. 2019).

<sup>114</sup> *Id.* at 663.

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

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 664.

<sup>118</sup> *Id.*

And in *Whitlock v. Williams Lea, Inc.*,<sup>119</sup> a Senior Account Manager alleged that she was paid less than a male Senior Account Manager who performed the same work.<sup>120</sup> However, the facts showed that, although Senior Account Managers shared common general duties of supervising direct and indirect reports for one or multiple clients across various service lines and ensuring delivery of the contract services, plaintiff had failed to present facts to show that her actual job duties were the same as her alleged comparator.<sup>121</sup> In particular, the facts showed that her comparator was handling about six or seven different clients and six or seven different service lines compared to plaintiff's one, and managed more revenue and supervised more employees than plaintiff.<sup>122</sup> The court concluded: "[p]erhaps the differences that [employer] identified are somehow insignificant – like maybe it did not take much effort to supervise employees, so the difference in the number of supervisees was insignificant to the job – but [plaintiff] has not provided any such evidence."<sup>123</sup>

Finally, in *Kling v. Montgomery County, Maryland*,<sup>124</sup> 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. 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.<sup>125</sup> 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."<sup>126</sup>

## 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 collective or 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 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."<sup>127</sup> The only statutorily-mandated procedural prerequisite to bringing a collective action is that: "no employee shall be a party

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<sup>119</sup> *Whitlock v. Williams Lea, Inc.*, No. 16-CV-6347, 2019 WL 1382267 (N.D. Ill. Mar. 27, 2019).

<sup>120</sup> *Id.* at \*2.

<sup>121</sup> *Id.* at \*3.

<sup>122</sup> *Id.* at \*3-4.

<sup>123</sup> *Id.* at \*5.

<sup>124</sup> *Kling v. Montgomery Cnty., Md.*, 324 F. Supp. 3d 582 (D. Md. 2018). In this 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. *Id.* at 588. After the county pointed out that the male comparator's 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. *Id.* at 591-92.

<sup>125</sup> *Id.* at 595-96.

<sup>126</sup> *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 than a male predecessor, the Sixth Circuit permits claims of unequal pay.") (citing *Conti v. Am. Axle*, 326 Fed. Appx. 900, 914 (6th Cir. 2009)).

<sup>127</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").

CLASS ACTIONS	VS	COLLECTIVE ACTIONS
Governed by Rule 23 of the Federal Rules of Civil Procedure or analogous state laws	VS	Governed by 29 U.S.C. § 216(b)
Applies to numerous areas of law and can relate to actions asserted under federal or state statutes (but not the federal EPA)	VS	Applies only to actions filed under the Fair Labor Standards Act ("FLSA"), Equal Pay Act ("EPA"), and Age Discrimination in Employment Act ("ADEA")
Generally a more rigorous and challenging certification process in which plaintiffs must satisfy several criteria to support their class action allegations	VS	Certification requirements are often not as rigorous as those of a class action—§ 216(b) only requires that collective action members be "similarly situated"
Certification requirements under Rule 23(a) include: (1) Numerosity; (2) Commonality; (3) Typicality; (4) Adequacy of Representation	VS	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
Rule 23 class action members are "in" unless they affirmatively "opt out," which tends to lead to higher participation as compared to collective actions	VS	§ 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

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>128</sup> 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.<sup>129</sup> 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.”<sup>130</sup> “[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.”<sup>131</sup>

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 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.<sup>132</sup> 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.

However, even if plaintiffs are successful in obtaining conditional certification of a collective action, that collective action may later be decertified after discovery has revealed the substantial differences among collective action members, which makes certification through trial untenable. For example, in *Bertroche v. Mercy Physician Associates, Inc.*,<sup>133</sup> 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.<sup>134</sup> 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.”<sup>135</sup> 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.<sup>136</sup>

In 2019, however, the district court granted the employer’s motion to decertify the collective action, holding that further discovery had revealed that the nature of plaintiffs’ claims would require an individualized determination of the factual situation of each physicians practice.<sup>137</sup> Plaintiffs’ theory in support of proceeding to trial as a certified collective action was that the common compensation scheme under which plaintiffs were paid was itself a discriminatory policy.<sup>138</sup> According to plaintiffs, if they could

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<sup>128</sup> *Id.*

<sup>129</sup> 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)).

<sup>130</sup> *Bouaphankeeo v. Tyson Foods*, 564 F. Supp. 2d 870, 892 (N.D. Iowa 2008).

<sup>131</sup> *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.”).

<sup>132</sup> *Id.* at 895.

<sup>133</sup> *Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-CV-59-CJW-KEM, 2019 WL 4307127 (N.D. Iowa Sept. 11, 2019).

<sup>134</sup> *Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-CV-59-CJW, 2018 WL 4107909, at \*3 (N.D. Iowa Aug. 29, 2018). 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. *Id.* 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. *Id.* at \*4.

<sup>135</sup> *Id.* at \*3.

<sup>136</sup> *Id.*

<sup>137</sup> *Bertroche*, 2019 WL 4307127, at \*28.

<sup>138</sup> *Id.* at \*24.



establish that that policy itself was discriminatory, that would entitle each plaintiff to relief under the EPA without any further showing.<sup>139</sup> The district court agreed with plaintiffs in so far as proof that the compensation scheme itself was discriminatory could provide proof that each plaintiff suffered a violation, and that, “when proof of a single policy, or of conduct in conformity with that policy, shows a violation as to all plaintiffs, those plaintiffs may be similarly situated for purposes of the Equal Pay Act.”<sup>140</sup> However, the employer argued that because the compensation scheme was designed to account for each physicians’ different medical and business decisions, which would result in different total compensation amounts, plaintiffs cannot be similarly situated to each other for purposes of proceeding as a certified collective action.<sup>141</sup> The district court relied on the decision of the Central District of Illinois in *Ahad* (discussed below), holding that, “the different ways in which physicians operate their medical practices can serve to differentiate them from one another such that they should not be able to proceed collectively.”<sup>142</sup> The district court held that the same reasoning applied because the dissimilarities among plaintiff’s medical practices weighed in favor of decertifying the collective action: “because the compensation scheme looks at the specific factual situation of each physicians’ practice, pursuing this avenue would require each plaintiff to present evidence that is specific to her medical practice.”<sup>143</sup>

Similarly, in *Ahad v. Board of Trustees of Southern Illinois University*,<sup>144</sup> the District Court for the Central District of Illinois conditionally certified a collective action of female faculty physicians. 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.<sup>145</sup> However, the court later 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.<sup>146</sup> Plaintiff’s expert had shown that female physicians are paid less at a statistically significant level than similarly situated male physicians.<sup>147</sup> 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.<sup>148</sup> According to plaintiff, the case was appropriate for class treatment because the centralized compensation 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.”<sup>149</sup> 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.”<sup>150</sup> On March 28, 2019, the court decertified the collective action as well, holding that plaintiff had failed to identify a common policy that caused the alleged discrimination.<sup>151</sup>

And in *Finefrock v. Five Guys Operations*,<sup>152</sup> the District Court for the Middle District of Pennsylvania initially granted conditional certification of a collective action of female restaurant Assistant and General Managers. Defendant tried to defeat conditional certification by pointing to the fact that the EPA only

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

<sup>140</sup> *Id.* (citing *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014)).

<sup>141</sup> *Id.* at \*25.

<sup>142</sup> *Id.* at \*26 (quoting *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 15-CV-3308, 2019 WL 1433753, at \*4 (C.D. Ill. Mar. 28, 2019)).

<sup>143</sup> *Id.* at \*28.

<sup>144</sup> *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-CV-3308, 2017 WL 4330377 (C.D. Ill. Sept. 29, 2017).

<sup>145</sup> *Id.* at \*4.

<sup>146</sup> *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-CV-3308, 2018 WL 4350180 (C.D. Ill. Sept. 12, 2018).

<sup>147</sup> *Id.* at \*9.

<sup>148</sup> *Id.* at \*10.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*11.

<sup>151</sup> *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-CV-3308, 2019 WL 1433753 (C.D. Ill. Mar. 29, 2019).

<sup>152</sup> *Finefrock v. Five Guys Operations, LLC*, 344 F. Supp. 3d 783 (M.D. Pa. 2018). In this case, the employer used two processes for determining managers’ salaries. *Id.* at 786. 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. *Id.* The District Manager sets salaries and raises with approval from the Area Manager, Director of Operations, and, eventually, the Vice President of Operations. *Id.*

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.”<sup>153</sup> 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.<sup>154</sup> Those same factors allowed the court to conclude that conditional certification of a nationwide collective action was appropriate: “[b]ecause the 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.”<sup>155</sup>

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 *Miller v. City of New York*,<sup>156</sup> 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.<sup>157</sup> The court disagreed, holding that there were “stark differences in training, job requirements, and job responsibilities” between the two positions.<sup>158</sup> 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.<sup>159</sup> 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

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<sup>153</sup> *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)).

<sup>154</sup> *Finefrock*, 344 F. Supp. 3d at 789.

<sup>155</sup> *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.

<sup>156</sup> *Miller v. City of New York*, No. 15-CV-7563, 2018 WL 2059841 (S.D.N.Y. May 1, 2018).

<sup>157</sup> *Id.* at \*1.

<sup>158</sup> *Id.* at \*4.

<sup>159</sup> *Id.* at \*5

greater responsibilities, including issuing summonses and testifying in court; and (4) they work at different, often busier intersections and sometimes at night.<sup>160</sup>

In 2019, the district court's opinion was upheld by the Second Circuit.<sup>161</sup> In a short, unpublished opinion, the Second Circuit held that the school crossing guard and traffic enforcement agent positions were not substantially equivalent.<sup>162</sup> Plaintiffs had tried to argue that the district court erred when it failed to circumscribe the scope of its comparison to times when traffic enforcement agents are temporarily assigned to work at school crossing guard posts.<sup>163</sup> However, the Second Circuit noted that plaintiffs failed to cite any authority that would support narrowing the scope of the analysis to those time periods, but ultimately held that this argument had been waived because it had not been presented to the court below.<sup>164</sup> The court concluded: "the [school crossing guard] and [traffic enforcement agent] jobs are not substantially equivalent, as [traffic enforcement agents] must fulfill more requirements, undergo more training, perform all responsibilities, and labor under different and more hazardous working conditions."<sup>165</sup>

On the other hand, however, in *Ellis v. Google, Inc.*,<sup>166</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 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.<sup>167</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>168</sup>

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.<sup>169</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>170</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

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<sup>160</sup> *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.").

<sup>161</sup> *Bloise v. City of New York*, 768 F. App'x 103 (2d Cir. 2019).

<sup>162</sup> *Id.* at \*138.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> 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).

<sup>167</sup> *Id.* at 1-2.

<sup>168</sup> *Id.* at 2.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> Am. Compl. ¶¶ 2-3, *Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Super. Ct. Jan. 3, 2018).

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>171</sup>

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.”<sup>172</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 because the pay disparity alleged in plaintiffs’ complaint is based on nationwide averages.

Also in 2019, the District Court for the District of New Jersey approved a class settlement in a long-running equal pay act litigation, *Smith v. Merck & Co., Inc.*<sup>173</sup> In that case, plaintiffs had alleged that the defendant, a global pharmaceutical company, had systematically paid female sales employees less than similarly situated male sales employees who performed the same job under the same working conditions.<sup>174</sup> The court had previously granted conditional certification on the strength of plaintiffs’ evidence, which showed that sales representatives had similar responsibilities, and an expert report that showed compensation differences among male and female representatives.<sup>175</sup> As a result of that order, notice was sent to more than three thousand female sales representatives nationwide, of which 671 chose to join the lawsuit.<sup>176</sup> After extensive discovery, the parties came to a resolution at mediation.<sup>177</sup> On July 19, 2019, the district court preliminarily approved the class settlement, conditionally certified a class action for settlement purposes, and finally certified the EPA collective action for settlement purposes.<sup>178</sup> The district court scrutinized the settlement and held that the employer’s agreement to pay \$6,200,000 to the settling class and collective action members was a fair and reasonable settlement in light of the discovery that had taken place and the claims and potential liability at issue.<sup>179</sup>

## 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.<sup>180</sup>

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.”<sup>181</sup> The

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<sup>171</sup> *Id.* ¶¶ 40-41.

<sup>172</sup> 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).

<sup>173</sup> *Smith v. Merck & Co., Inc.*, No. 13-CV-2970, 2019 WL 3281609 (D.N.J. July 19, 2019).

<sup>174</sup> *Smith v. Merck & Co., Inc.*, No. 13-CV-2970, 2016 WL 1690087, at \*2 (D.N.J. Apr. 27, 2016).

<sup>175</sup> *Id.* at \*5.

<sup>176</sup> *Smith*, 2019 WL 3281609, at \*1.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, at \*4-5.

<sup>179</sup> *Id.* at \*5.

<sup>180</sup> 29 U.S.C. § 206(d)(1).

<sup>181</sup> Cal. Lab. Code § 1197.5(a)(1)(D).

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.”<sup>182</sup>

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.”<sup>183</sup> Finally, the statute explicitly excludes the use of prior salary as a justification for a wage disparity.<sup>184</sup> 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.

Economic concerns and corporate cutbacks are often cited as a factor other than sex. For example, in *Routen v. Suggs*,<sup>185</sup> an elementary school fine arts programmer alleged that she was discriminated against because the defendant school district paid her less than a male fine arts director who performed the same work.<sup>186</sup> The District Court for the Eastern District of Arkansas held a bench trial and ruled against plaintiff.<sup>187</sup> On appeal, the Eighth Circuit held that it was not erroneous for the district court to find that plaintiff’s sex was not a reason for her pay cut or the reduction in the length of her contract. The evidence at trial showed that the school district had taken these actions because of economic and administrative concerns, rather than discrimination.<sup>188</sup> The district court and the Eighth Circuit were satisfied that the school district had targeted plaintiff’s job for downsizing because the subject did not appear on statewide testing and therefore did not require two programmers, and because the director of fine arts could handle both elementary and secondary fine arts programming.<sup>189</sup>

However, in *Cavazos v. Housing Authority of Bexar County*,<sup>190</sup> the District Court for the Western District of Texas denied cross-motions for summary judgment, holding that a material issue of fact existed as to whether plaintiff and her purported comparators positions involved equal work, and whether the employer had established that the alleged discrimination was due to a factor other than sex. In that case, an interim, Acting Executive Director for a County Housing Authority alleged that she was paid less than the prior Executive Directors and less than what was offered to the person who was eventually selected for the Executive Director position.<sup>191</sup> The Housing Authority argued that the temporary nature of the interim

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<sup>182</sup> *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.*

<sup>183</sup> *Id.* § 1197.5(a)(2-3).

<sup>184</sup> *Id.* § 1197.5(a)(4).

<sup>185</sup> *Routen v. Suggs*, 772 F. App’x 377 (8th Cir. 2019).

<sup>186</sup> *Id.* at \*377.

<sup>187</sup> *Id.* at \*378.

<sup>188</sup> *Id.* The Eighth Circuit also held that there was adequate support for the finding that plaintiff and her male comparator performed different work. Among other things, he was the overall director of fine arts program, including both secondary and elementary programs, whereas plaintiff only supervised the elementary fine arts program. *Id.* Given these differences in job duties, the Eighth Circuit held that it was “not clearly erroneous for the court to find that [the jobs] were not substantially equal.” *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Cavazos v. Hous. Auth. of Bexar Cnty.*, No. SA-17-CV-432-FB, 2019 WL 1048855 (W.D. Tex. Mar. 5, 2019).

<sup>191</sup> *Id.* at \*3.

Executive Director position justified the disparity in pay as compared to the prior Executive Directors.<sup>192</sup> The district court noted that other courts have held that the temporary nature of a position may constitute a factor other than sex to justify an otherwise illegal pay disparity provided that the position was temporary in fact and that the employee in that position knew it was temporary.<sup>193</sup> However, the court also noted that the EEOC has cautioned that when a temporary position lasts longer than one month, it could raise questions as to whether the reassignment was in fact intended to be temporary.<sup>194</sup> The district court held that the evidence did not establish as a matter of law that plaintiff's performance as an interim Executive Director could be considered a temporary reassignment because, among other things, she had been told that she was the search committee's second-choice candidate and that she would be automatically selected if the first choice-candidate declined (which he did). Under such circumstances, the district court held that this issue was a question for the jury to resolve.<sup>195</sup>

In *Ruiz-Justiniano v. U.S. Postal Service*,<sup>196</sup> 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.<sup>197</sup> Plaintiff argued that the reasoning behind the guidelines – to stay competitive in outside hiring – was mere pretext for wage discrimination.<sup>198</sup> The court held that "this does not change the fact that upon making an external hire, . . . the salary hiring guidelines established by USPS headquarters were used to determine her salary."<sup>199</sup>

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*,<sup>200</sup> the District Court for the District of New Mexico refused to weigh an employer's "other factors" at the summary judgment stage. The court held that relative levels of

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<sup>192</sup> *Id.* at \*7.

<sup>193</sup> *Id.* (citing *Joyner v. Town of Elberta*, 22 F. Supp. 3d 1201, 1209 (S.D. Ala. 2014); *Gaston v. Caugherty*, No. CV 14-1436, 2015 WL 8601232, at \*10 (W.D. Pa. Dec. 14, 2015)).

<sup>194</sup> *Id.* (citing 29 C.F.R. § 1620.26(b)). The district court first held that plaintiff had failed to establish that her duties as interim Executive Director were the same as or substantially similar to those performed by the two previous Executive Directors. *Id.* at \*6. Critically, the Housing Authority had introduced evidence to show that the prior Executive Directors had also administered various other programs in addition to the day-to-day management of the Housing Authority. Prior to plaintiff's appointment as interim Executive Director, the agency's board had decided that the new Executive Director would operate the Housing Authority programs exclusively. *Id.* The district court held that this constituted a genuine issue of material fact as to whether plaintiff's duties were really virtually identical to those of her comparators. *Id.*

<sup>195</sup> *Id.* at \*8.

<sup>196</sup> *Ruiz-Justiniano v. U.S. Postal Serv.*, No. 16-CV-1526 (MEL), 2018 WL 3218363 (D.P.R. June 29, 2018).

<sup>197</sup> *Id.* at 16.

<sup>198</sup> *Id.* at \*17.

<sup>199</sup> *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))).

<sup>200</sup> *Gonzales v. Cnty. of Taos*, No. 17-CV-582-F, 2018 WL 3647206 (D.N.M. Aug. 1, 2018). In that case, the employer sought to justify the alleged pay disparity by pointing to the different qualifications between plaintiff and her male comparator. *Id.* at \*14. Specifically, plaintiff had argued that although her comparator had 27 years of experience in adult detention centers, he had no

experience and qualifications “are questions of fact for a jury to decide and are not appropriate for summary judgment.”<sup>201</sup> Similarly, in *Ackerson v. Rector and Visitors of the University of Virginia*,<sup>202</sup> 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.<sup>203</sup> 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.”<sup>204</sup>

And in *Bowen v. Manheim Remarketing, Inc.*,<sup>205</sup> 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.<sup>206</sup> 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.”<sup>207</sup> The employer tried to argue that the prior manager had worked for the company longer and had a higher salary before being promoted into that position.<sup>208</sup> However, the Eleventh Circuit held that those arguments were undercut by the fact that 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.<sup>209</sup> 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.”<sup>210</sup>

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 rather than continue to defend a lawsuit on the merits.

## 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

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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. *Id.* at \*15.

<sup>201</sup> *Id.* at \*15.

<sup>202</sup> *Ackerson v. Rector & Visitors of the Univ. of Va.*, No. 3:17-CV-11, 2018 WL 3209787 (W.D. Va. June 27, 2018).

<sup>203</sup> *Id.* at \*7.

<sup>204</sup> *Id.* (citing and quoting *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018)) (emphasis in original).

<sup>205</sup> *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358 (11th Cir. 2018).

<sup>206</sup> *Id.* at 1360.

<sup>207</sup> *Id.* at 1362 (emphasis in original).

<sup>208</sup> *Id.* at 1363.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

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.

In *Rizo v. Yovino*,<sup>211</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 federal EPA.<sup>212</sup> The County used a salary schedule to determine the starting salaries of management-level employees, which used prior salary to determine starting salaries.<sup>213</sup> 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>214</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>215</sup>

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."<sup>216</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>217</sup>

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.<sup>218</sup> 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.<sup>219</sup>

On February 27, 2020, the Ninth Circuit, sitting *en banc*, issued another decision in *Rizo v. Yovino*, holding – again – that prior salary cannot be used as the sole "factor other than sex" to justify pay

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<sup>211</sup> *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017), *aff'd en banc*, 887 F.3d 453 (9th Cir. Apr. 9, 2018), *rev'd*, 139 S.Ct. 706 (2019).

<sup>212</sup> *Id.* at 1163.

<sup>213</sup> *Id.* 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%. *Id.* 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. *Id.* at 1164.

<sup>214</sup> *Rizo v. Yovino*, No. 1:14-CV-9423-MJS, 2015 WL 9260587, at \*9 (E.D. Cal. Dec. 18, 2015).

<sup>215</sup> See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982).

<sup>216</sup> *Rizo v. Yovino*, 887 F. 3d at 468. 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).

<sup>217</sup> *Id.* at 461.

<sup>218</sup> *Yovino v. Rizo*, 139 S.Ct. 706 (2019).

<sup>219</sup> *Id.* at 708. 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." *Id.* at (quoting *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960)). 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." *Id.*



differences under the federal EPA.<sup>220</sup> The new decision echoed Judge Reinhardt's April 2018 opinion, holding that past salary is not a "factor other than sex" and reviving Rizo's suit under the EPA. Writing for the majority, Judge Morgan Christen wrote that "setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination."<sup>221</sup> She also wrote: "[t]he express purpose of the act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the act and perpetuate the very discrimination the EPA aims to eliminate."<sup>222</sup>

The Ninth Circuit's decision in *Rizo v. Yovino* adds to a growing split among the Courts of Appeals on this issue. For example, the Seventh Circuit came to the opposite conclusion in *Lauderdale v. Illinois Department of Human Services*.<sup>223</sup> The Seventh Circuit's 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>224</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>225</sup> The Eighth Circuit has also followed this line of reasoning.<sup>226</sup>

Other Circuits have held differently. For example, in *Irby v. Bittick*,<sup>227</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>228</sup> The Tenth Circuit has also held that prior salary cannot stand alone as a defense to an EPA claim. In *Angove v. Williams-Sonoma, Inc.*,<sup>229</sup> a male retail employee argued that the district court had impermissibly applied a "market factor" theory to evaluate his claim, arguing that it is impermissible to

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<sup>220</sup> *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020).

<sup>221</sup> *Id.* at 1228.

<sup>222</sup> *Id.* at 1219. In concurring opinions, two judges said their colleagues should have taken the more moderate approach of some other circuits. Judge Margaret McKeown said the policy did not justify the disparity between plaintiff's pay and that of her male coworkers, but salary history "may provide a lawful benchmark" for setting pay if considered alongside other factors such as education and training. *Id.* at 1234. Judge Consuelo Callahan also concurred, joined by Judges Tallman and Carlos Bea. She stated that an employer should be permitted to use past salary as a factor in setting pay, as long as its use "does not reflect, perpetuate, or in any way encourage gender discrimination." *Id.* at 1241.

<sup>223</sup> *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017). In this 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. *Id.* at 907-08. 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 the employees' prior salaries. *Id.* at 908-09.

<sup>224</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>225</sup> *Id.* at 909. 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. *Id.*

<sup>226</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.

<sup>227</sup> *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

<sup>228</sup> *Id.* at 955 (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 n.9 (11th Cir. 1988)).

<sup>229</sup> *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500 (10th Cir. 2003).

justify a wage disparity solely upon the “going market rate” for employees of a certain gender.<sup>230</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>231</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.<sup>232</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>233</sup> This is because “the EPA only precludes an employer from relying *solely* upon a prior salary to justify pay disparity.”<sup>234</sup>

This issue continues to divide the district courts as well. For example, in *Kellogg v. Ball State University*,<sup>235</sup> the District Court for the Southern District of Indiana held that the Seventh Circuit allowed theories of “salary compression” as a justification for wage disparities. In that case, a female University instructor alleged that she was paid substantially less than a male University instructor who performed comparable work.<sup>236</sup> After she made a complaint to the Dean of her college, she was told that the reason her salary did not match those of other instructors is because they had started at a higher starting salary, and over time, each instructor had varying percentage increases in pay that had led to the present disparity in pay.<sup>237</sup>

After plaintiff brought suit, the University defended its pay practices by arguing that plaintiff’s chosen comparator had extremely positive letters of recommendation, 21 years of prior classroom teaching experience, numerous teaching honors and publications, an impressive interview, prior experience teaching AP courses, and, critically for the court’s decision, a high former salary.<sup>238</sup> The University also cited market forces and salary compression as factors other than sex explaining the pay disparity. Relying on the Ninth Circuit’s reasoning in *Rizo*, the plaintiff argued that the University’s salary compression theory only served to “perpetuate past wage discrimination against her by pulling it into the present.”<sup>239</sup> However, the district court pointed to the Seventh Circuit’s reasoning contrary to *Rizo*, and held that the University’s reliance on salary compression qualifies as a factor other than sex that “comports with current Seventh Circuit precedent.”<sup>240</sup> The court therefore granted the employer’s motion for summary judgment on plaintiff’s EPA claim.

And in *Stice v. City of Tulsa*,<sup>241</sup> a city employee alleged that she was paid a lower salary than males in her department despite performing higher quality work.<sup>242</sup> The city justified the pay disparity by arguing that

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<sup>230</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 [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.

<sup>231</sup> *Angove*, 70 F. App’x at 508.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</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 F. App’x 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).

<sup>235</sup> *Kellogg v. Ball State Univ.*, No. 1:18-CV-2564-TAB-TWP, 2020 WL 707846 (S.D. Ind. Feb. 12, 2020).

<sup>236</sup> *Id.* at \*1.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at \*2.

<sup>239</sup> *Id.* at \*3 (quotations omitted).

<sup>240</sup> *Id.*

<sup>241</sup> *Stice v. City of Tulsa*, No. 17-CV-261-CVE-FHM, 2018 WL 3318894 (N.D. Okla. July 5, 2018).

<sup>242</sup> *Id.* at \*1-2. The city explained the differences in pay as resulting from tenure, experience, and education level, among other things. *Id.* at \*2. However, the company’s HR department then conducted a salary review of plaintiff’s department, which determined

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.<sup>243</sup> 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."<sup>244</sup> 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.<sup>245</sup> The city claimed that it had based starting salaries on other factors, such as education and experience.<sup>246</sup> 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."<sup>247</sup>

This issue also sometimes comes up not as a matter of higher prior salary *per se*, but rather as increased negotiating leverage or bargaining power when starting salaries are set. For example, in *Duncan v. Texas Health & Human Services Commission*,<sup>248</sup> two female nurses and one male nurse applied and were hired into the same nursing position but at different salary levels.<sup>249</sup> The employer's usual practice was to offer each applicant the minimum starting salary for the position and begin salary negotiations from there.<sup>250</sup> However, the male applicant was offered a higher salary initially because of his higher private sector salary.<sup>251</sup> The female employees argued that the male employee was paid more solely because of his gender and his prior salary.<sup>252</sup> 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.<sup>253</sup> 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."<sup>254</sup> 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."<sup>255</sup>

In *Grigsby v. AKAL Security, Inc.*,<sup>256</sup> 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

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that plaintiff's salary was significantly below other employees within her job position. *Id.* Plaintiff's salary was increased as a result, but not to the level of other male colleagues.

<sup>243</sup> *Id.* at \*4.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* (citing and quoting *Angove v. Williams—Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. July 8, 2003)).

<sup>246</sup> *Id.* at \*5.

<sup>247</sup> *Id.* And in *Thomas v. Gray Transp., Inc.*, No. 17-CV-2052-KEM, 2018 WL 6531661 (N.D. Iowa Dec. 12, 2018), 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. *Id.* at \*7. 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." *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.").

<sup>248</sup> *Duncan v. Tex. Health & Human Servs. Comm'n*, No. 17-CV-23-SS, 2018 WL 1833001 (W.D. Tex. Apr. 17, 2018).

<sup>249</sup> *Id.* at \*1.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at \*2.

<sup>252</sup> *Id.* at \*3.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at \*4.

<sup>255</sup> *Id.* at \*4 n.3 (citing *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *rev'd*, 139 S.Ct. 707 (2019)).

<sup>256</sup> *Grigsby v. AKAL Security, Inc.*, No. 5:17-CV-6048-DGK, 2018 WL 3078769 (W.D. Mo. June 21, 2018).

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.<sup>257</sup> 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."<sup>258</sup>

### 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*,<sup>259</sup> 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 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.<sup>260</sup> It argued that plaintiffs' comparators received larger merit raises because of their involvement in study abroad programs and because of exceptional performance.<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup>

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."<sup>266</sup> 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."<sup>267</sup> Having failed to do so, the court concluded that the university had failed to demonstrate the existence of a bona fide merit system.

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<sup>257</sup> *Id.* at \*7.

<sup>258</sup> *Id.*

<sup>259</sup> *Brunarski v. Miami Univ.*, No. 1:16-CV-311, 2018 WL 618458 (S.D. Ohio Jan. 26, 2018).

<sup>260</sup> *Id.* at \*10.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at \*11.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at \*12.

<sup>267</sup> *Id.*

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*,<sup>268</sup> 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."<sup>269</sup> 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."<sup>270</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>271</sup>

## 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.

For example, in *Emanuel v. Alabama State University*,<sup>272</sup> a university professor alleged that he was paid less than a similarly-situated female employee due to discriminatory compensation decisions made by his employer throughout his career.<sup>273</sup> The university argued that plaintiff's compensation was less than his comparator's due to a "rank adjustment" that was given years earlier to all employees at a time when plaintiff was still an associate professor, but when his comparator was a full professor.<sup>274</sup> However, plaintiff was able to point to a subsequent salary schedule, which was implemented two years after the rank adjustment, that was intended to replace previous salary considerations.<sup>275</sup> The court refused to grant summary judgment for the employer on these facts, holding that "evidence that the 2009-10 [] Salary Schedule replaced all previous salary considerations demonstrates that there is a genuine issue of material fact as to whether the non-discriminatory reasons offered by [employer] are pretextual."<sup>276</sup>

Similarly, in *Fortenberry v. Gemstone Foods, LLC*,<sup>277</sup> 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.<sup>278</sup> 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."<sup>279</sup> 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.<sup>280</sup> 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

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<sup>268</sup> *Summy-Long v. Pa. State Univ.*, 715 F. App'x 179, 183 (3d Cir.).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Emanuel v. Ala. State Univ.*, No. 2:17-CV-658-ALB, 2019 WL 3246398 (M.D. Ala. July 18, 2019).

<sup>273</sup> *Id.* at \*1.

<sup>274</sup> *Id.* at \*3.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Fortenberry v. Gemstone Foods, LLC*, No. 5:17-CV-1608-AKK, 2018 WL 6095196 (N.D. Ala. Nov. 21, 2018).

<sup>278</sup> *Id.* at \*1.

<sup>279</sup> *Id.* at \*4.

<sup>280</sup> *Id.*

and whose role was not essential to production.<sup>281</sup> 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.”<sup>282</sup>

However, in *Anderson-Strange v. National Railroad Passenger Corp.*,<sup>283</sup> the District Court for the District of Delaware rejected a claim that the reclassification of a manager’s position to a lower pay grade was merely pretext for discrimination where it was done pursuant to a restructuring plan and there was no evidence that that plan had been inconsistently applied. In that case, a female District Manager of a train station alleged that she was underpaid as compared to her predecessor in that position and other male Station and District Managers.<sup>284</sup> Her employer argued that her lower salary was not due to her sex, but rather due to, among other things, a nationwide restructuring plan, which was intended to reflect the differences in complexity and the scope of different management positions.<sup>285</sup> The court held that this was sufficient to establish the defense of a factor other than sex, meaning that the burden then shifted to plaintiff to show that this reason was merely a pretext for discrimination.<sup>286</sup> The court held that she failed to do so because she had failed to provide evidence rebutting the existence of the restructuring plan, nor had she established that it had been inconsistently applied.<sup>287</sup> Plaintiffs’ proffered comparators managed more stations across a larger geographic territory, and they managed direct reports that were spread across those multiple stations – factors that were consistent with plaintiff’s employer’s rationale for reclassifying her position into a lower pay grade.<sup>288</sup>

Some courts have focused more heavily on an employer’s state of mind to decide the pretext analysis. In *Hornsby-Culpepper v. Ware*,<sup>289</sup> for example, 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.<sup>290</sup> 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.<sup>291</sup> Although plaintiff disputed the proffered reasons, the Eleventh Circuit 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.”<sup>292</sup> 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.”<sup>293</sup>

Similarly, in *Black v. Barrett Business Services, Inc.*,<sup>294</sup> the District Court for the District of Idaho granted summary judgment against a branch manager of an employee staffing and recruiting company who complained that she was paid less than equally qualified branch managers at her branch and a nearby

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Anderson-Strange v. Nat’l R.R. Passenger Corp.*, No. 17-CV-1859-RGA, 2019 WL 2438842 (D. Del. June 11, 2019).

<sup>284</sup> *Id.* at \*1.

<sup>285</sup> *Id.* at \*4. The restructuring plan assigned different titles and pay bands based on the number of stations managed, the types of stations managed, the size of the territory managed, ridership, revenue, and the number of direct reports. *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at \*4-5.

<sup>289</sup> *Hornsby-Culpepper v. Ware*, 906 F.3d 1302 (11th Cir. 2018).

<sup>290</sup> *Id.* at 1307.

<sup>291</sup> *Id.* at 1312-13.

<sup>292</sup> *Id.* at 1314.

<sup>293</sup> *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.”).

<sup>294</sup> *Black v. Barrett Bus. Servs., Inc.*, No. 1:18-CV-96-CWD, 2019 WL 2250263 (D. Idaho May 23, 2019).

branch. The employer argued that plaintiff's comparators were paid more because they had experience that the plaintiff did not have.<sup>295</sup> In particular, the employer pointed to the fact that the comparators had significant experience growing and managing their own businesses. The Company's strategy was to hire branch managers who could successfully build their branch into multi-million dollar revenue centers.<sup>296</sup> The court rejected plaintiff's attempt to show that this was a pretext for discrimination. She was not able to present evidence to show discriminatory animus on the part of her supervisors or fellow branch managers.<sup>297</sup> Moreover, the employer was able to show that it had hired other female branch managers at salaries that were higher than plaintiff's salary and higher than other male branch managers, and that there were other male branch managers who, like plaintiff, never received a salary raise, and that it had increased the salaries of other female branch managers over time.<sup>298</sup> Accordingly, the court held that plaintiff had failed to establish that the Company's proffered reasons for the salary disparity were a pretext for discrimination.

## 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 conduct, such as filing a complaint of wage discrimination.<sup>299</sup> Establishing a causal link between a plaintiff's protected activity and the adverse employment action allegedly suffered as a result of that activity 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 *Sharkey v. Fortress Systems, International*,<sup>300</sup> the District Court for the Western District of North Carolina entered summary judgment against a female employee who alleged retaliation when she was terminated after she refused to agree to a new compensation plan that would have reduced her base salary and increased her commission. Plaintiff worked in a sales position for a mobile surveillance and fleet management company.<sup>301</sup> Although she was classified as an independent contractor, rather than an employee, the court held that there existed disputed issues of material fact that prevented the court from dispensing with plaintiffs' claims on those grounds.<sup>302</sup> With respect to retaliation, plaintiff alleged that she was being singled out for unequal pay by means of the new compensation plan and that she had been terminated in retaliation for her refusal to sign onto that new plan.<sup>303</sup> However, the court held that plaintiff could not establish causation on these facts. She was terminated because she would not agree to the reduced compensation. But she was selected for the reduced compensation package *before* she

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<sup>295</sup> *Id.* at \*6.

<sup>296</sup> *Id.* at \*7.

<sup>297</sup> *Id.* at \*8.

<sup>298</sup> *Id.* at \*9.

<sup>299</sup> 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 F. App'x 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.

<sup>300</sup> *Sharkey v. Fortress Sys., Int'l*, No. 3:18-CV-19-FDW-DCK, 2019 WL 3806050 (W.D.N.C. Aug. 13, 2019).

<sup>301</sup> *Id.* at \*1.

<sup>302</sup> *Id.* at \*5.

<sup>303</sup> *Id.* at \*4.

complained about it.<sup>304</sup> So although the termination happened later in time, it was the consequence of an adverse action that occurred prior to plaintiff's alleged protected activity.<sup>305</sup> Accordingly, plaintiff failed to show that her protected activity was the but-for cause of the alleged retaliatory conduct.<sup>306</sup>

In *Yearns v. Koss Construction Co.*,<sup>307</sup> 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. 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.<sup>308</sup> But the court noted that her complaint came two months before her layoff: "[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."<sup>309</sup> The Fourth Circuit came to a similar conclusion in *Coleman v. Schneider Electric USA*.<sup>310</sup> In that case, the Fourth Circuit held that "the relevant date is when the decisionmakers learned of [plaintiff's] protected activity," and noted that the adverse action happened more than one year after they learned about Plaintiff's EEOC charge, the alleged cause for retaliation.<sup>311</sup>

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 events. For example, in *Donathan v. Oakley Grain, Inc.*,<sup>312</sup> 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 were starting at higher rates of pay. Plaintiff was laid off approximately eight days later.<sup>313</sup> The Eighth Circuit held that: "[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."<sup>314</sup>

## 2. Arbitration Agreements

As in many other areas of employment litigation, the existence and enforceability of arbitration agreements have become an increasingly important defense for employers. The issue before the court

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<sup>304</sup> *Id.* at \*8.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* See also *Desai v. Univ. of Mass., Mem. Med. Ctr., Inc.*, 415 F. Supp. 3d 236, 240 (D. Mass. 2019) (denying motion to dismiss because plaintiff – a doctor employed by a medical school – had pled at least three adverse actions and: "[b]ecause any discriminatory motivation underlying these actions may be attributable to Defendant Medical School, the Court finds that Plaintiff has shown a plausible entitlement to relief on her discrimination claims.").

<sup>307</sup> *Yearns v. Koss Constr. Co.*, No. 17-CV-4201-C-WJE, 2019 WL 191656 (W.D. Mo. Jan. 14, 2019). In this 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. *Id.* at \*1. 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.

<sup>308</sup> *Id.* at \*4.

<sup>309</sup> *Id.* at \*5.

<sup>310</sup> *Coleman v. Schneider Electric USA*, 755 F. App'x 247 (4th Cir. 2019).

<sup>311</sup> *Id.* at 250. 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." *Id.*

<sup>312</sup> *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735 (8th Cir. 2017).

<sup>313</sup> *Id.* at 737. As further evidence of the time-causation connection, the Eighth Circuit noted that ten minutes after Plaintiff put her complaints in an email to the president of the company, the president forwarded her email to plaintiff's manager and they discussed her complaint by phone. *Id.*

<sup>314</sup> *Id.* at 740-41.



usually revolves around whether the arbitration provision in question covers equal pay claims. Plaintiffs' attempts to argue around such provisions can be quite creative, but are most often unsuccessful.

For example, in *Daly v. Citigroup Inc.*,<sup>315</sup> the Second Circuit upheld the district court's decision to compel arbitration of, among other things, an EPA claim arising out of a lawsuit brought by an Assistant Vice President of a bank. In that case, plaintiff admitted that she was subject to an arbitration agreement, but argued that her claims were not subject to arbitration because there was clear congressional intent to preclude such claims from the waiver of judicial remedies.<sup>316</sup> The Second Circuit explained that its prior precedent had already established that there is insufficient evidence with respect to claims under Title VII that Congress intended to preclude the waiver of judicial remedies.<sup>317</sup> According to the Second Circuit, the plaintiff had failed to present any evidence that the situation was different for claims arising under the EPA: "plaintiff has failed to present any evidence that Congress intended claims arising under the EPA to be nonarbitrable."<sup>318</sup> Accordingly, plaintiff had failed to meet her burden to show that her claims were nonarbitrable.<sup>319</sup>

In *Bester v. Compass Bank*,<sup>320</sup> the District Court for the Northern District of Alabama compelled two contract analysts to arbitrate their EPA claims against their bank employer. In that case, the two contract analysts had signed an application containing an agreement to arbitrate any potential claims concerning any aspect of their employment relationship with the bank.<sup>321</sup> The court held that a valid arbitration agreement existed between the parties and that the broad language of the arbitration provision included plaintiff's EPA claims within its scope.<sup>322</sup> However, plaintiffs alleged that the bank should be estopped from enforcing the arbitration agreement because it allegedly enforced it in a discriminatory manner; according to plaintiffs, the bank did not enforce the agreement against Caucasian or male employees.<sup>323</sup> The district court held that the bank's allegedly discriminatory enforcement of the arbitration agreement does not render the agreement unenforceable: "the plaintiffs must raise the alleged discriminatory enforcement in arbitration with their other claims."<sup>324</sup> The district court also rejected plaintiff's fraudulent inducement arguments. Plaintiffs alleged that they were fraudulently induced into the arbitration agreement based on the bank's representation that it is an equal opportunity employer.<sup>325</sup> The court held that that representation involves the employment contract generally, rather than the agreement to arbitrate itself.<sup>326</sup>

And in *Davidow v. H&R Block, Inc.*,<sup>327</sup> the District Court for the Western District of Missouri compelled a seasonal tax preparer into arbitration regarding, among other things, her EPA claim. In that case, the seasonal tax preparer had signed a tax professional employment agreement that contained an arbitration provision.<sup>328</sup> The district court first held that the arbitration agreement bound both parties to the contract and therefore there was mutuality of promise and sufficient consideration to create a valid and

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<sup>315</sup> *Daly v. Citigroup Inc.*, 939 F.3d 415 (2d Cir. 2019).

<sup>316</sup> *Id.* at 420.

<sup>317</sup> *Id.* at 422 (quoting and citing *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 148 (2d Cir. 2004)).

<sup>318</sup> *Id.* (quoting *Crawley v. Macy's Retail Holdings, Inc.*, No. 15 Civ. 2228 (KPF), 2017 WL 2297018, at \*5 (S.D.N.Y. May 25, 2017)).

<sup>319</sup> *Id.*

<sup>320</sup> *Bester v. Compass Bank*, No. 2:18-CV-1817-AKK, 2019 WL 1897176 (N.D. Ala. Apr. 29, 2019).

<sup>321</sup> *Id.* at \*1.

<sup>322</sup> *Id.* at \*2.

<sup>323</sup> *Id.* at \*3.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Davidow v. H&R Block, Inc.*, No. 19-CV-1022-CV-W-ODS, 2019 WL 2090690 (W.D. Mo. May 13, 2019).

<sup>328</sup> *Id.* at \*1.

enforceable arbitration agreement.<sup>329</sup> The district court concluded that the arbitration agreement included plaintiff's claims because she had agreed to arbitrate claims arising under federal statute.<sup>330</sup>

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*,<sup>331</sup> 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.<sup>332</sup> Under prior California precedent, *Armendariz v. Foundation Health Psychare Services, Inc.*,<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup> 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.<sup>336</sup>

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.<sup>337</sup> 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.<sup>338</sup> 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.<sup>339</sup> In addition, the court held that the provisions that

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<sup>329</sup> *Id.* at \*4.

<sup>330</sup> *Id.* at \*6.

<sup>331</sup> *Ramos v. Super. Ct.*, 239 Cal Rptr. 3d 679 (Cal. Ct. App. 2018).

<sup>332</sup> *Id.* at 685.

<sup>333</sup> *Armendariz v. Found. Health Psychare Servs., Inc.*, 99 Cal. Rptr. 2d 745 (Cal. 2000).

<sup>334</sup> *Ramos*, 239 Cal Rptr. 3d at 692.

<sup>335</sup> *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 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.

<sup>336</sup> *Id.* at 694.

<sup>337</sup> *Id.* at 696-97.

<sup>338</sup> *Id.* at 696.

<sup>339</sup> *Id.*

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.<sup>340</sup>

A similarly broad class and collective action was recently alleged against a law firm (an employment law firm), which also implicated the potential applicability of an arbitration provision. In *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*,<sup>341</sup> 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."<sup>342</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). 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.<sup>343</sup>

On March 26, 2019, the District Court for the Central District of California held that plaintiff must arbitrate her claims.<sup>344</sup> First, the court held that an evidentiary hearing was not required to determine whether plaintiff knew the terms of the arbitration agreement and voluntarily agreed to be bound by those terms.<sup>345</sup> Because plaintiff had received email notifications informing her about the arbitration provisions and allowing her a chance to opt out, the court held that no hearing was necessary as "the only potential dispute is whether [plaintiff] read the three email notices, not whether she received them."<sup>346</sup> The court then held that an agreement to arbitrate was formed by virtue of plaintiff's failure to opt out of the agreement despite several notices informing her of her right to do so: "[s]ince she continued working at [employer] after March 1, 2016 without opting out, she was bound by the terms of the Arbitration Agreement."<sup>347</sup> Accordingly, except for her representative claim under the Private Attorney General Act – which was stayed pending arbitration – plaintiff was required to pursue her claims in arbitration.

### 3. Proving An "Establishment"

The EPA requires an employee to compare their wages against other employees within the same physical place of business in which they work. According to the regulations issued by EEOC to construe the EPA, a single establishment "refers to a distinct physical place of business" within a company. "[E]ach physically separate place of business is ordinarily considered a separate establishment" under the EPA. The regulations contrast this with the entire business, or "enterprise," which "may include several separate places of business."<sup>348</sup> Courts presume that multiple offices are not a "single establishment" unless unusual circumstances are demonstrated.<sup>349</sup> Not surprisingly, defining the scope of the establishment for purposes of comparing salaries and wages is a frequently contested issue in EPA litigation.

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<sup>340</sup> *Id.* at 704.

<sup>341</sup> Compl., *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:2018-CV-00304 (N.D. Cal. Jan. 12, 2018), ECF No. 1.

<sup>342</sup> *Id.* ¶ 3.

<sup>343</sup> *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 18-CV-304-WHO, 2019 WL 144585 (N.D. Cal. Jan. 9, 2019).

<sup>344</sup> *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 8:19-CV-60-JVS-ADS, 2019 WL 1449502 (N.D. Cal. Mar. 26, 2019).

<sup>345</sup> *Id.* at \*5.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at \*6.

<sup>348</sup> 29 C.F.R. §1620.9(a).

<sup>349</sup> See *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252, 287 (S.D.N.Y. 2018) (finding that pay and promotion decisions were not sufficiently "centralized" to amount to "unusual circumstances" warranting a finding that the many offices and practice areas qualify as a single "establishment" under the EPA even because "although [defendant] set generally applicable guidelines, individual pay and promotion decisions were left to the discretion of local practice area leaders," which decisions were "reviewed by firm leadership on an aggregate basis against budget"); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (holding that evidence did not "demonstrate the level of centralization necessary to justify treating all of the company's technical writers as working at a single establishment" where "the specific salary to be offered a job applicant is determined by the local supervisor").

For example, in *Black v. Barrett Business Services, Inc.*,<sup>350</sup> discussed in more detail above, the District Court for the District of Idaho held that the plaintiff did not work in the same establishment as all but one of her comparators because the other managers worked at another branch.<sup>351</sup> In the Ninth Circuit, that decision depends not just on the geographic distance between offices, but also on “the nature of the services provided and the degree of central administration, such as budgeting, hiring, and day-to-day management.”<sup>352</sup> The court found that there was no reason to combine the branches in this case, because, among other things, the branches were managed independently, had their own sales and profitability goals, each serviced and solicited distinct clients, and that there was never any significant overlap in the daily operations.<sup>353</sup> Accordingly, for purposes of the EPA – but not Title VII, which does not have the EPA’s “same establishment” requirement – the plaintiff was limited to just one comparator.

Similarly, in *Lindsley v. TRT Holdings*,<sup>354</sup> the District Court for the Northern District of Texas held that a plaintiff could not establish that comparator employees who worked at other locations of the same hotel chain worked in the same “establishment” for purposes of establishing a prima facie case of an EPA violation. In that case, a hotel Food and Beverage Director alleged that she was paid less than other Food and Beverage Directors who worked at different outposts of the same hotel chain in different cities in Texas.<sup>355</sup> The district court held that Directors from other locations of the same hotel chain are not part of the same “establishment” where plaintiff worked, meaning that none of those Directors were proper comparators for purposes of analyzing her discrimination claim.<sup>356</sup>

The district court acknowledged that there exist some unusual circumstances in which multiple physical locations can count as a single establishment, but held that those situations were not present in this case. In particular, the district court held that the hotel chain’s corporate headquarter’s influence over its member locations was limited.<sup>357</sup> The evidence demonstrated that officers from individual hotel locations have a say in determining the salaries of their own Food and Beverage Directors.<sup>358</sup> In particular, the evidence showed that the last person plaintiff interviewed with for the job was someone from the hotel location where she was eventually employed, rather than someone from corporate, and that person gave her the offer even though it went against a corporate employee’s recommendation.<sup>359</sup> To the district court, this demonstrated that individual hotel locations had significant autonomy in employment decisions. The district court concluded, “[plaintiff] has failed to show that a single establishment encompasses more than [the Corpus Christi hotel location where plaintiff worked]. Consequently, none of the Food and Beverage Directors from other [hotel chain] locations are eligible pay comparators for [plaintiff’s] equal pay act claim.”<sup>360</sup>

## 4. Who Is An “Employer” Under The EPA?

One issue that is frequently litigated in EPA lawsuits is whether one or more entities can be considered the “employer” of a complaining employee. Often that determination depends on what test is used to determine joint employment. Under Title VII, subject to some enumerated exceptions, an “employer” means “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any

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<sup>350</sup> *Black v. Barrett Bus. Servs., Inc.*, No. 1:18-CV-96-CWD, 2019 WL 2250263 (D. Idaho May 23, 2019).

<sup>351</sup> *Id.* at \*5.

<sup>352</sup> *Id.* (quoting *Winther v. City of Portland*, 21 F.3d 1119, at \*1 (9th Cir. 1994)).

<sup>353</sup> *Id.* at \*6.

<sup>354</sup> *Lindsley v. TRT Holdings*, No. 3:17-CV-2942-X, 2019 WL 6467256 (N.D. Tex. Dec. 2, 2019).

<sup>355</sup> *Id.* at \*1.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at \*6.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

agent of such a person.”<sup>361</sup> The EPA uses the broader definition found in the FLSA, which defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .”<sup>362</sup> An “employee” is defined as “any individual employed by an employer,”<sup>363</sup> and the term “employ” means “to suffer or permit to work.”<sup>364</sup> Together, those definitions have been interpreted as “the broadest definition . . . ever included in any one act.”<sup>365</sup> Courts interpreting that definition have focused on the “economic realities” of the purported employment relationship. The “economic realities” inquiry, in turn, focuses on a number of factors related to control over the employee, including whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.<sup>366</sup> Deciding that issue can be quite complex and often gives rise to significant substantive litigation apart from the actual merits of a lawsuit.

For example, in *Moore v. Baker*,<sup>367</sup> the District Court for the Southern District of Alabama allowed a complaint against alleged joint-employers to proceed, holding that the fact-intensive nature of the joint-employer inquiry required discovery and further factual development. In that case, a Director of Student Support Services at a community college sued her employer(s) for reassigning her to a new position as Adult Education Counselor/Student Services Coach.<sup>368</sup> The community college subsequently hired a new director of student support services at a higher salary than plaintiff had been paid.<sup>369</sup> In her complaint, plaintiff named the college as well as a handful of individual defendants and the community college system’s Board of Trustees.<sup>370</sup> The district court had to consider whether the Board of Trustees was plaintiff’s employer under title VII and the EPA.

The court first noted that the term “employer” is defined differently under Title VII and the EPA.<sup>371</sup> Plaintiff alleged that the college and the Board of Trustees should be treated as a single employer because the Board of Trustees has the authority to make rules and regulations for the college, including regarding qualifications for faculty in establishing and maintaining an annual salary schedule.<sup>372</sup> Plaintiff also alleged that the college president was directly responsible to the Chancellor and the Board of Trustees for the college’s day-to-day operations and serves at the pleasure of the Board of Trustees.<sup>373</sup> The court held that those allegations would suffice at the motion to dismiss stage under both statutes, holding that joint-employment was a fact-specific inquiry that was best left to the summary judgment stage.<sup>374</sup>

Similarly, in *Jafri v. Signal Funding LLC*,<sup>375</sup> the District Court for the Northern District of Illinois allowed a lawsuit to proceed against multiple alleged joint employers on scant factual allegations. In that case, the Chief Operating Officer of a financial company brought a claim under the federal and Illinois Equal Pay

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<sup>361</sup> 42 U.S.C. § 2000e(b).

<sup>362</sup> 29 U.S.C. § 203(d).

<sup>363</sup> *Id.* § 203(e)(1).

<sup>364</sup> *Id.* § 203(g).

<sup>365</sup> *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

<sup>366</sup> See, e.g., *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d. Cir. 1999).

<sup>367</sup> *Moore v. Baker*, No. 18-CV-311-KD-B, 2019 WL 1374674 (S.D. Ala. Mar. 8, 2019).

<sup>368</sup> *Id.* at \*1.

<sup>369</sup> *Id.* at \*2.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at \*6. Under title VII, an employer is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such a person.” *Id.* (quoting 42 U.S.C. § 2000e(b)). The definition of “employer” under the FLSA/EPA is: “any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* at \*7 (quoting 29 U.S.C. § 203(d)). The court noted that term is defined more broadly under the FLSA/EPA than under the common law. *Id.* In order to determine whether persons or entities are employers under the FLSA/EPA, courts look to the economic reality of the circumstances concerning whether the putative employee is economically dependent upon the alleged employer. *Id.*

<sup>372</sup> *Moore*, 2019 WL 1374674, at \*6.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at \*7.

<sup>375</sup> *Jafri v. Signal Funding LLC*, No. 19-CV-645, 2019 WL 4824883 (N.D. Ill. Oct. 1, 2019).

Acts, alleging that she was paid less than five of her male subordinates.<sup>376</sup> The complaint was brought against plaintiff's employer entity, as well as affiliated entities and the founder and Managing Partner of the corporate parent of those affiliated entities.<sup>377</sup> The employer argued that the complaint failed to allege that the affiliated entities had any control over plaintiff's pay.<sup>378</sup> However, the district court held that, "the allegation that she was employed by these entities is sufficient to plausibly allege that the entities had some control over her pay. This is particularly so when one individual – defendant [founder] – owns all three entities and is alleged to have directed [plaintiff] to move from Illinois to Florida in order to be able to more effectively work for all three entities."<sup>379</sup> The district court therefore allowed the case to proceed to discovery in order to determine, among other things, whether each of the defendants had the alleged control over plaintiff's compensation.<sup>380</sup>

However, in *Caples v. Thiel*,<sup>381</sup> the District Court for the Eastern District of Wisconsin dismissed an EPA claim that was brought against four individual defendants rather than plaintiff's actual entity employer. In that case, a field male employee in an accounting/HR position alleged that she was paid less and did not receive the same benefits, pension, vacation, or full-time status as her male predecessor.<sup>382</sup> The defendants moved to dismiss on the basis that plaintiff had named her male coworkers and supervisors as defendants rather than the company that employed her.<sup>383</sup>

The district court held that, under Seventh Circuit precedent, individual employees cannot be held liable under the ADA and Title VII.<sup>384</sup> However, with respect to the EPA, the district court noted that other courts within the Seventh Circuit had come to different conclusions concerning whether a complaint could be brought against individual defendants.<sup>385</sup> Under the Fair Labor Standards Act's definition of "employer," i.e. – "any person acting directly or indirectly in the interest of an employer in relation to an employee"<sup>386</sup> – an individual may be sued if that person is someone who is acting directly or indirectly in the interest of an employer in relation to an employee.<sup>387</sup> Accordingly, the district court held that in order to proceed on an EPA claim in federal court against an individual defendant, "a plaintiff must not only explain what each defendant did, but must explain how each defendant's actions harmed her."<sup>388</sup> The court granted the defendant's motion to dismiss because plaintiff had failed to allege those facts.<sup>389</sup>

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<sup>376</sup> *Id.* at \*1.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at \*4.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Caples v. Thiel*, No. 17-CV-1797-pp, 2019 WL 1116948 (E.D. Wisc. Mar. 11, 2019).

<sup>382</sup> *Id.* at \*1.

<sup>383</sup> *Id.* at \*3.

<sup>384</sup> *Id.* at \*5.

<sup>385</sup> *Id.* at \*6.

<sup>386</sup> 29 U.S.C. § 203(d).

<sup>387</sup> *Caples*, 2019 WL 1116948, at \*6.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

# 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 certain demographic information (gender, race, and ethnicity) in each of ten job categories.<sup>390</sup> 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.<sup>391</sup>

The EEOC's proposed changes came under fierce opposition by pro-business groups.<sup>392</sup> 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.<sup>393</sup> The next day, the EEOC advised employers to submit the EEO-1 Report used in previous years by the March 31, 2018 deadline.<sup>394</sup>

Then, on March 4, 2019, in *National Women's Law Center v. Office of Management and Budget*,<sup>395</sup> the District Court for the District of Columbia held that the OMB's stay 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.<sup>396</sup> 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 and that the EEOC's burden estimates did not account for the use of those data

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<sup>390</sup> See Current EEO-1 Report, available at <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>.

<sup>391</sup> See U.S. 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>.

<sup>392</sup> 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. See U.S. Chamber of Commerce, *Request for Review: EEOC's Revision of the Employer Information Report*, available at <http://src.bna.com/mFi>. 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. 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>. 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. 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>. 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." *Id.* 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. *Id.* 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. *Id.*

<sup>393</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>394</sup> *Id.* Then Acting-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." See U.S. Equal Employment Opportunity Commission, *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>.

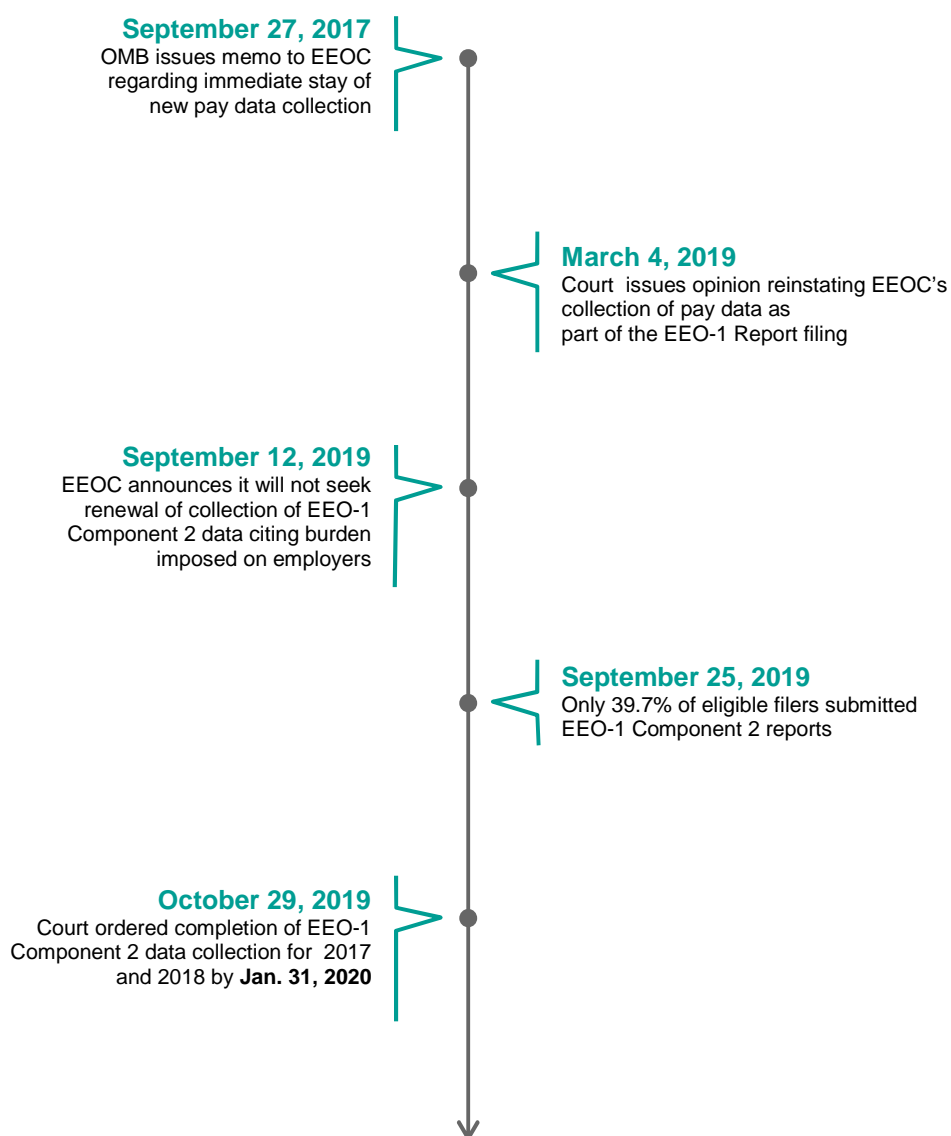
<sup>395</sup> *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66 (D.D.C. Mar. 4, 2019).

<sup>396</sup> *Id.* at 87.

# Ensuring Equal Pay

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.

## Tracking Recent Developments In Pay Data Collection





specifications. But the court held 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.”<sup>397</sup> With respect to the 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.”<sup>398</sup> Ultimately, the court vacated the stay, holding that it “totally lacked the reasoned explanation that the APA requires.”<sup>399</sup>

The 2018 EEO-1 reporting period opened on March 18, 2019. The deadline for employers to submit reports was May 31, 2019. 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.”<sup>400</sup> 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.<sup>401</sup> The court issued an order on April 25, 2019 that, among other things, ordered the EEOC to take all necessary steps to complete the EEO-1 Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019, to issue a statement on its website to that effect, and to make periodic reports concerning its efforts to implement the data collection process.<sup>402</sup>

The order also stated that the EEO-1 Component 2 data collection would not be deemed complete until the percentage of EEO-1 reporters that have submitted their reports equals or exceeds the mean percentage of EEO-1 reporters for the past four reporting years.<sup>403</sup> After the September 30, 2019 deadline for submitting reports had passed, the parties disputed whether the EEOC had met this threshold. The court held that it had not. On October 29, 2019, the court disagreed with how the EEOC had calculated the mean percentage of EEO-1 reports submitted from previous years.<sup>404</sup> The court ordered that “the EEOC must continue to take all steps necessary to complete the EEO-1 Component 2 data collection for calendar years 2017 and 2018 by January 31, 2020.”<sup>405</sup>

On December 19, 2019, the EEOC filed a second motion asking the court to determine that the EEOC’s collection of EEO-1 Component 2 data was complete, or for an order clarifying the response rate at which the court would deem that collection complete.<sup>406</sup> The EEOC noted the steps it had taken to facilitate the collection of Component 2 data and that, as of December 18, 2019, 85.6% of eligible filers had submitted Component 2 data.<sup>407</sup> On February 10, 2020, the court relented and held that the EEO-1 Component 2 data collection that was ordered on April 25, 2019 is complete and that the government has no further obligation to collect such data. Among other things, the court found that as of February 6, 2020, 88.8% of eligible filers had submitted Component 2 data for calendar year 2017, and 89.6% of eligible filers had submitted that data for calendar year 2018.<sup>408</sup>

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<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 88.

<sup>399</sup> *Id.* at 90.

<sup>400</sup> 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.

<sup>401</sup> *Id.* at 1.

<sup>402</sup> Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Apr. 25, 2019), ECF No. 71; see also Press Release, U.S. Equal Employment Opportunity Commission, EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection (July 15, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/7-15-19.cfm>.

<sup>403</sup> Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Apr. 25, 2019), ECF No. 71.

<sup>404</sup> Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Oct. 29, 2019), ECF No. 91.

<sup>405</sup> *Id.* at 3.

<sup>406</sup> Defs.’ Second Mot. for Order Determining Completion of Component 2 Data Collection or, in the Alternative, for Clarification, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Dec. 19, 2019), ECF No. 95.

<sup>407</sup> *Id.* at 2-5.

<sup>408</sup> Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Feb. 10, 2020), ECF No. 102.

Barring any further developments with this lawsuit, this decision likely puts an end to employers' obligations to collect and submit this type of data. On September 12, 2019, the EEOC issued a Paperwork Reduction Act Notice, wherein it stated that it was planning to seek approval under the Paperwork Reduction Act to continue administering Component 1 of the EEO-1 survey, but that it was not planning to continue using the EEO-1 Report to collect Component 2 data information.<sup>409</sup> The public comment period regarding that proposed change closed on November 12, 2019.<sup>410</sup> And on November 20, 2019, the EEOC held a public hearing regarding those proposed changes.<sup>411</sup>

From a data collection perspective, this issue appears to be closed for the foreseeable future.<sup>412</sup> However, the EEOC now has in its possession two full years of detailed pay data. What they choose to do with that data, if anything, may or may not influence how the EEOC pursues its equal pay enforcement priority in the coming years.

## B. Case Law Developments

As noted above, lawsuits brought under the EPA tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice prior to trial. This is especially true when it comes to EEOC-initiated litigation.<sup>413</sup> Several recent decisions are illustrative of this trend. For example, in *EEOC v. The George Washington University*,<sup>414</sup> the District Court for the District of Columbia denied an employer's motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility. In that case, the EEOC had brought a lawsuit on behalf of a female university Director of Athletics, who alleged that a male colleague was treated more favorably and given greater opportunities because of his sex.<sup>415</sup>

The University moved to dismiss the complaint. However, the district court held that the complaint "straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities."<sup>416</sup> The court held that there was no

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<sup>409</sup> Paperwork Reduction Act Notice, 84 Fed. Reg. 48138 (Sept. 12, 2019); see also Press Release, U.S. Equal Employment Opportunity Commission, EEOC Holds Public Hearing on Proposed EEO-1 Report Amendments (Nov. 4, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/11-4-19a.cfm>; Press Release, U.S. Equal Employment Opportunity Commission, EEOC Holds Public Hearing on Proposed EEO-1 Report Amendments (Nov. 4, 2019), available at <https://www.eeoc.gov/eeoc/newsroom/release/11-4-19a.cfm>.

<sup>410</sup> Paperwork Reduction Act Notice, 84 Fed. Reg. 48138 (Sept. 12, 2019).

<sup>411</sup> Press Release, U.S. Equal Employment Opportunity Commission, Experts Examine the Efficacy of EEOC's Pay Data Collection Model (Nov. 20, 2019), <https://www1.eeoc.gov/eeoc/newsroom/release/11-20-19.cfm?renderforprint=1>.

<sup>412</sup> However, the EEOC and OMB have appealed the issue to the D.C. Circuit, arguing, among other things, that district court exceeded its authority in directing EEOC to proceed with the collection in a particular manner. See Brief for Appellants at 2, *Natl' Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 19-5130 (D.C. Cir. Aug. 19, 2019). It is unclear what impact the appeal could have, if successful, on the EEOC's ability to use or rely on data it had no authority collect.

<sup>413</sup> EPA lawsuits therefore put a premium on fact gathering, something that the EEOC typically excels at given its broad investigative and administrative subpoena powers. It was therefore noteworthy when in *EEOC v. VF Jeanswear, LP*, No. MC-16-CV-47-PHX-NVW, 2017 WL 2861182 (D. Ariz. July 5, 2017), 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. 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. *Id.* at \*6. But the court held 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." *Id.* However, on October 3, 2019, the Ninth Circuit reversed the district court's decision, holding that "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party. Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party." *EEOC v. VF Jeanswear, LP*, 769 F. App'x 477, 478 (9th Cir. 2019).

<sup>414</sup> *EEOC v. George Washington Univ.*, No. 17-CV-1978 (CKK), 2019 WL 2028398 (D.D.C. May 8, 2019).

<sup>415</sup> *Id.* at \*1. According to the complaint, the University advertised a new position in its athletics department, but plaintiff had been informed that the job was off-limits to her because the University had already decided to hire her male coworker. The position paid far more than plaintiff's position. *Id.*

<sup>416</sup> *Id.* at \*4.

reason for the complaint to get into the equal skill, effort, and responsibility, or other similar working conditions of those two positions, because at the motion to dismiss stage, a court cannot dismiss a complaint even if the plaintiff did not plead the elements of a prima facie case.<sup>417</sup>

Similarly, in *EEOC v. Enoch Pratt Free Library*,<sup>418</sup> the District Court for the District of Maryland denied an employer's motion to dismiss an EPA lawsuit brought by the EEOC as a representative action on behalf of female librarian supervisors.<sup>419</sup> Then, on October 30, 2019, the district court also denied cross-motions for summary judgment.<sup>420</sup> With respect to the motion filed by the EEOC, the district court found that genuine issues of material fact persist regarding elements of the EEOC's prima facie case. In particular, evidence showed that library supervisors perform a wide variety of job duties across various library branches: "Overall, the branches generally have varying responsibilities in light of their different physical plants, different clientele, and different community resources. . . . A factfinder should therefore assess whether the duties performed by [supervisors] are sufficiently similar to establish a prima facie case of unequal pay for equal work."<sup>421</sup>

With respect to the employer's motion, the district court applied the reasoning of the Fourth Circuit's decision in *EEOC v. Maryland Insurance Administration*.<sup>422</sup> In that case, the EEOC alleged that the employer paid three former female fraud investigators less than it paid four former fraud investigators with comparable credentials and experience who were men.<sup>423</sup> The Fourth Circuit held that the EPA requires "that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons do *in fact* explain the wage disparity."<sup>424</sup> The employer argued that it used the state's Standard Salary Schedule, which classifies each position to a grade level and assigns each new hire to a step within that grade level. The Fourth Circuit rejected this defense because it found that the employer exercised discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire's qualifications and experience.<sup>425</sup>

Similarly, in *Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy ("MAPS") to determine compensation for newly hired library supervisors.<sup>426</sup> According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.<sup>427</sup> The district court held, however, that that policy did not necessarily compel any specific salary to be awarded to a new hire.<sup>428</sup> The MAPS policy left open the

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<sup>417</sup> *Id.* at \*5. Interestingly, for those who follow EEOC litigation, the district court also held that an Equal Pay Act claim is not subject to the EEOC's conciliation requirement. *Id.* at \*8.

<sup>418</sup> *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2019 WL 5593279 (D. Md. Oct. 30, 2019).

<sup>419</sup> The employer argued that the EEOC did not include sufficient details regarding the job responsibilities of the male librarian supervisors and the female librarian supervisors to determine whether they were performing equal work. *Id.* at \*5. But the court held that the EEOC had pled that librarian supervisors required the same educational and experiential qualifications, shared the same core duties of operating a branch library, managed moderate-sized staffs, and performed accompanying administrative duties. *Id.* at \*6. From this, the court held that it was reasonable to infer that managing different branch libraries within the same city required the same substantive responsibilities in similar working conditions: "the plaintiff here did assert the job responsibilities of the employees at issue. The factor-by-factor comparison encouraged by the defendants is not necessary to state a plausible claim sufficient to survive a motion to dismiss." *Id.* at \*8.

<sup>420</sup> *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2018 U.S. Dist. LEXIS 13297 (D. Md. Aug. 2, 2018).

<sup>421</sup> *Id.* at \*5.

<sup>422</sup> *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 124 (4th Cir. 2018).

<sup>423</sup> *Id.* at 129. The EEOC presented evidence that while female investigators ended up earning \$45,503 to \$50,300 per year, the male investigators earned from \$47,194 to \$51,561 per year. *Id.*

<sup>424</sup> *Id.* The Fourth Circuit also noted that the burden on the employer "necessarily is a heavy one." *Id.* at 120.

<sup>425</sup> *Id.* The employer also argued that the pay disparities were justified by the qualifications and experience of the comparators. This defense, too, failed. The Fourth Circuit emphasized that a viable affirmative defense under the EPA requires more than a showing that a factor other than sex could explain or may explain the salary disparity. Rather, the Fourth Circuit stated that the EPA requires that a factor other than sex actually explains the salary disparity. *Id.* at 123.

<sup>426</sup> *Id.* at \*3.

<sup>427</sup> *Id.* at \*6.

<sup>428</sup> *Id.*

possibility that the employer could apply discretion with respect to setting starting salaries.<sup>429</sup> Applying *Maryland Insurance Administration*, the district court concluded that “[the EEOC’s comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator’s] salary.”<sup>430</sup>

And in *EEOC v. University of Miami*,<sup>431</sup> the District Court for the Southern District of Florida denied a motion to dismiss claims brought by professors in the *same* department. In that case, a university professor in the political science department alleged that she was paid less than her male counterpart in the same department.<sup>432</sup> The court held that the EEOC had supported its claims of pay discrimination with numerous allegations relating to the professors job duties, such as teaching classes and publishing books and articles.<sup>433</sup> The complaint also alleged that the female professor had two more years of teaching experience and had published more works.<sup>434</sup> Moreover, the EEOC had alleged that both professors were in the same department and had been promoted to full professor at the same time after a review by the same committee based on the same criteria.<sup>435</sup>

The court distinguished the Fourth Circuit’s reasoning in *Spencer v. Va. State Univ.*<sup>436</sup> (discussed above), because in that case, the University professors taught in different departments and the differences between academic departments generally involve differences in skill and responsibility, and because the female professor in that case had taught at the undergraduate level, while her male comparators had taught graduate courses.<sup>437</sup> The district court held that “[n]one of this reasoning applies here because [plaintiff] and [her comparator] both taught in the same department at the undergraduate level.”<sup>438</sup> Accordingly, the district court denied the employer’s motion to dismiss.

Finally, in *EEOC v. Denton County*,<sup>439</sup> the EEOC brought an action on behalf of a physician, alleging that her employer discriminated against her based on her gender in regards to pay and promotions in violation of Title VII of the Civil Rights Act and the EPA. The parties cross-moved for summary judgment. The EEOC’s motion argued that there was no genuine issue of material fact that the EEOC has met its prima facie burden under the EPA and that the employer had failed to establish one of its statutory defenses; namely, that the salary difference was due to a factor other than sex.<sup>440</sup> Defendant cross-moved, arguing that the EEOC could not establish its prima facie case and that it had established its affirmative defense.<sup>441</sup> The court refused to grant either motion with respect to this claim, saying it was “not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC’s claim for violation of the Equal Pay Act entitling it to judgment as a matter of law.”<sup>442</sup>

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<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at \*7.

<sup>431</sup> *EEOC v. Univ. of Miami*, No. 19-CV-23131-Civ-Scola, 2019 WL 6497888 (S.D. Fla. Dec. 3, 2019).

<sup>432</sup> *Id.* at \*1.

<sup>433</sup> *Id.* at \*2.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019).

<sup>437</sup> *Id.* at \*3.

<sup>438</sup> *Id.*

<sup>439</sup> *EEOC v. Denton Cnty.*, No. 4:17-CV-614, 2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018).

<sup>440</sup> *Id.* at \*21.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at \*22.





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