

# Management Alert



## California Judge Allows Pay Equity Class Action To Move Forward On Behalf Of Female Google Employees Who Were Employed In Thirty Separate Job Positions

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**Seyfarth Synopsis:** After initially dismissing a sweeping class action complaint alleging systemic pay discrimination on behalf of “all women employed by Google in California,” the Court has now decided to allow an amended – and only somewhat narrowed – class action to proceed. Key to the Court’s decision were the allegations in Plaintiffs’ amended complaint that Google had a company-wide policy of considering new hires’ previous salaries when determining starting salary and job level.

On March 27, 2018, a California Superior Court denied Google’s motion to defeat Plaintiffs’ second attempt to plead a class action alleging wide-ranging gender-based pay discrimination. Although Plaintiffs’ amended complaint had narrowed their class definition, it still encompassed employees who worked in thirty separate positions, many in which the named Plaintiffs had never worked and about which had no direct knowledge.

But Plaintiffs had added allegations that Google maintains a class-wide policy of using prior salary to set salary for new hires. According to the complaint allegations, women in the United States are paid on average no more than 79 cents for each dollar a man is paid, and Google’s policy perpetuates this historic pay disparity. That was enough for the California Court to conclude, at least at the pleading stage, that common issues would predominate over individualized issues.

### Background

Plaintiffs filed their original complaint on September 14, 2017. That complaint pled a sweeping class definition of “all women employed by Google in California.” Google moved to dismiss the complaint and strike the class allegations, arguing that Plaintiffs fell short of articulating a community of interest when they brought the claim under such a broad category of employees. The Court granted Google’s motion to dismiss and to strike class allegations, but also granted plaintiffs leave to amend the complaint within 30 days.

Plaintiffs filed an amended complaint on January 1, 2018. The amended complaint narrowed the scope of Plaintiffs’ class allegations to a class consisting of “all women employed by Google in California” who have held a “Covered Position,” that was defined to include all job levels of 30 separate positions, which Plaintiffs grouped into six job families: (1) software engineer, (2) software manager, (3) engineer, (4) program manager, (5) sales, or (6) early childhood education. According to statements reportedly made at the hearing, this “narrowed” class would still contain at least 5,000 women.

Google argued that this class definition was still overbroad because, among other things, the named Plaintiffs never worked in any of the 15 positions associated with two of the included job categories. According to Google, Plaintiffs would have no knowledge of the work performed by employees in those job categories. Nor did Plaintiffs allege any overlap in duties, experience, or qualifications between those job families and the job families in which they actually held positions.

Google argued that Plaintiffs' lack of personal knowledge about those job families meant that they were merely guessing as to whether individuals in those positions were underpaid. Google also argued that Plaintiffs had failed to allege any facts to show that employees in those job families perform substantially similar or equal work. The Court would therefore have to undertake an individualized analysis to determine for each class member whether the employees' positions should be compared at all, and the cause of the alleged pay disparity. Google further took issue with the class-wide intentional discrimination claim on the grounds that Plaintiffs' claims arise entirely from their individual experiences unique to them, and do not implicate any company policy or practice.

## The Court's Decision

The Court disagreed, holding that Plaintiffs had adequately pled a class action on behalf of themselves and a class of women employed by Google in California who held any of the 30 Covered Positions. Critical to the Court's analysis were the allegations Plaintiffs had added to their amended complaint that Google maintained a company-wide policy for setting starting salary that included consideration of an employee's prior salary. Plaintiffs alleged that this policy perpetuates the historical pay disparity between men and women.

Plaintiffs alleged that, as a result of this policy, female employees in Covered Positions received a lower starting salary than men in the same job position and level, and that they were assigned lower job levels with lower salary ranges than men who perform substantially equal or similar work. Moreover, because raises are based on a percentage of employees' current salaries, they only serve to further perpetuate and widen the gender pay gap.

The Court held that this alleged policy was sufficient to withstand a demurrer at the pleading stage that common issues of law and fact predominated over individualized questions. They were also sufficient at this stage in the litigation to create an ascertainable class, which would be easy to identify based on whether employees held one of the 30 Covered Positions. Further, the Court found that plaintiffs had sufficiently pled that their claims are typical of the entire class, because the entire class was alleged to have been subjected to the same compensation policies and practices.

Regarding Plaintiffs' allegations of intentional discrimination, the Court relied on the same analysis, finding that the alleged policy of considering an employee's prior pay when deciding starting salary and/or job level, as well as the "stereotypes" that Google allegedly applied regarding what jobs women can or cannot do, could result in women receiving lower salaries than men. Based on Plaintiffs' assertions, the Court found that they stated a claim for intentional discrimination on a class-wide basis sufficient to withstand a demurrer.

## Implications For Employers

This decision is a worrying development for employers because it could provide a "blueprint" for how other plaintiffs may attempt to cobble together broad classes that encompass widely disparate job positions, seemingly without regard for the individual job duties or qualifications associated with those positions. Although Plaintiffs' amended complaint narrowed (somewhat) the scope of their class definition, that did not appear to have any bearing on the Court's decision. Instead, the key differences between Plaintiffs' original complaint and their amended complaint were the new allegations regarding Google's alleged policy of considering prior salary when making initial salary determinations. According to this Court, those allegations were sufficient at the pleading stage to bind together a class of 30 positions, half of which were ones in which the named Plaintiffs had never worked.

The historical pay disparity that Plaintiffs alleged in their amended complaint is based on nationwide averages. If consideration of prior salary in the context of that disparity is sufficient to plead a wide-ranging pay equity class, it is hard to see how this type of claim could not be replicated many times over across the country. Although few states have pay equity laws that are as robust and plaintiff-friendly as California's, the real issue is the rigor that must be applied to determine whether class treatment is warranted. If anything, that analysis under the federal Equal Pay Act – at least at the initial, conditional certification stage – is less onerous than the requirements under California class action law.

Plaintiffs may ultimately fail to maintain their case as a class action when it is subjected to more searching scrutiny at the class certification stage. Indeed, when faced with the evidentiary burden of having to establish that such a policy creates common issues that predominate over individualized issues, evaluation of the appropriateness of class certification may be very different. Nevertheless, it is hard to see how this decision does not give the plaintiffs' bar plenty of incentive to try, try, and try again.

We hope you will join us on Equal Pay Day, April 10, 2018, for a joint presentation of Seyfarth's Pay Equity and Complex Discrimination Litigation Groups, as we launch our first Trends and Developments in Pay Equity Litigation report. You can register for the Pay Equity Webinar [here](#).

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