Legal Update Article

Rethinking Pay Equity: Overcoming the Impact of Prior Salary Information

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This is the first article in our four-part series titled "Rethinking Pay Equity," a special series of legal alerts aimed at providing practical guidance to help employers address the many new rules, regulations, and best practices around equal pay in preparation for Equal Pay Day 2019. The series will culminate with a unique, complimentary webinar on April 2, Equal Pay Day, by the Co-Chairs of the Jackson Lewis Pay Equity Resource Group.

Background

Equal Pay Day is a date that changes each year based on how far into the year the average woman must work to earn what the average man earned in the previous year. This year, that day falls on April 2, 2019, which means the average woman has to work approximately one-fourth of the year before catching up to the average man's earnings.

According to the Bureau of Labor Statistics, the average woman made 80 percent of the average man's earnings in the fourth quarter of 2018. At the current pace, the gender pay gap would not be eliminated until approximately 2060. However, many state and local governments have taken action to speed up progress by addressing the perceived causes of the pay gap.

For example, many advocates have sought prohibitions on requesting or relying on prior salary information during the hiring process. The theory is that setting starting pay rate based on prior salary may have the effect of perpetuating pay discrimination. For employers, that means there may be a need to revisit long-standing practices around pay-setting decisions.

A Patchwork of State and City Prohibitions

Many cities and states have passed laws restricting prior salary information. Currently, California, Delaware, Hawaii, Massachusetts, New Jersey, Oregon, Puerto Rico, Vermont, New York City, Philadelphia, and San Francisco have enacted such restrictions. This list will continue to grow as more state and cities consider bans in 2019.

Further complicating the matter, many of these laws have unique or different requirements than others. For instance, in some jurisdictions, employers cannot ask applicants for prior salary information, but they can use information that is provided voluntarily. In other jurisdictions, employers can ask (such as for screening purposes), but cannot rely on the information when setting pay rates.

The result is a patchwork of different regulations for multistate employers to navigate.

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Federal Law is Evolving

Federal circuit courts are split on whether prior salary information may be a permissible "factor other than sex" under the Equal Pay Act. Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses," and it is the employer's burden to prove that they apply.

In ***Wernsing v. Department of Human Services, State of Illinois*** 427 F.3d 466 (7th Cir. 2005), the U.S. Court of Appeals for the Seventh Circuit held that reliance on prior salary information could be a defense to a pay discrimination claim. However, the U.S. Court of Appeals for the Ninth Circuit (reversing its own 1982 decision) more recently held that prior salary can no longer be used to justify a wage differential between men and women employees in ***Rizo v. Yovino***, 887 F.3d 453 (9th Cir. 2018). The Equal Employment Opportunity Commission submitted a friend-of-the-court brief in *Rizo,* arguing that recent data studies show prior salary information is not a non-discriminatory factor under the Equal Pay Act.

Although the 2018 decision in *Rizo* was vacated by the U.S. Supreme Court due to a procedural technicality, the substantive basis for the decision was not addressed and simply may be reiterated by the Ninth Circuit on remand. If so, it may end up before the Supreme Court again for a substantive ruling on the issue.

What's an Employer to Do?

Many employers have decided to end the practice of requesting prior salary information from applicants or using the information in setting starting pay. However, that is not a complete solution. Employers also should consider exploring whether there are any existing pay disparities that were created by the historical use of applicant prior salary information in setting starting pay rates.

Best practices include the following:

- Consider removing salary history inquiries from applications or tailor applications to jurisdictional requirements;
- Train recruiters and talent acquisition team not to ask about salary history in jurisdictions prohibiting such inquiries;
- Train those involved in pay-setting decisions to set pay without reliance on prior pay;
- Consider implementing written guidelines for establishing starting pay;
- Conduct an internal review of pay of others in similar positions for equity;
- Document the reasons for pay differences, particularly in starting pay rates; and
- Under attorney-client privilege, consider conducting a broader pay equity analysis to determine if reliance on prior salary history has perpetuated wage gaps in the organization and, if so, take remedial steps to address any issues.

Please contact Jackson Lewis with any questions about pay policies and analyses and training for management.