Recent Developments in the New Tide of Pay Equity Litigation

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Introduction

The call for equal pay has been reinvigorated by recent cultural, political and legislative initiatives as well as social media. The federal Equal Pay Act ("EPA")[1] and Title VII of the Civil Rights Act of 1964 ("Title VII")[2] have been in place for decades; however, the gender pay gap persists, with male employees continuing to earn more than female employees. The gap is even wider for non-white employees. In an effort to close the wage gap, bellwether states such as Massachusetts, California, New Jersey, Delaware, and Oregon began passing robust pay equality statutes in as early as 2016 and the tide of new states enacting equal pay legislation continues to rise. In 2019 alone, new pay discrimination laws took effect in 11 states[3], with more legislation on the horizon. Equal pay litigation is also on the rise and multi-million-dollar settlements of class action lawsuits are being reported weekly. Activist shareholder groups are demanding that companies conduct pay audits to ensure employees are being paid fairly and in compliance with these new laws.

This paper provides an overview of recent developments in pay equity legislation and litigation and analyzes significant court decisions and filings impacting pay equity claims.

[1] 29 U.S.C. § 206(d).
[2] 42 U.S.C § 2000e-2(a).
[3] Clarke-Figures Equal Pay Act, Ala. Code § 25-1-30; 820 Ill. Comp. Stat. Ann. 112/10; Conn. Gen. Stat. Ann. § 31-40z; An Act Regarding Pay Equity, 5 MRSA § 4577; RCW 49.58.005; Diane B. Allen Equal Pay Act, N.J.S.A § 10:5-12; Achieve Pay Equity Law, N.Y. Labor Law § 194; Cal. Labor Code § 1197.5; Haw. Rev. Stat. Ann. § 378-2.3; Md. Code Ann., Lab. & Empl. § 3-308; Wyo. Stat. Ann. § 27-4-304.

I. Pay Equity Legislation

A. Federal Equal Pay Legislation

The two primary laws that provide federal protections to employees against workplace compensation discrimination are the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The EPA was enacted in 1963 as an amendment to the Fair Labor Standards Act. The EPA 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 he pays wages to employees of the opposite sex in such establishment for equal work on job performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[4] However, the EPA permits wage differentials between the sexes when the disparity arises from: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex – the so-called "catch-all" exception.[5]

One year later, in 1964, Title VII was enacted and made it unlawful for an employer to, *inter alia*, discriminate with respect to an individual's compensation because of sex.[6] The EPA and Title VII are similar in that both statutes prohibit compensation discrimination on the basis of sex. However, there are significant differences between the EPA and Title VII. Title VII requires a plaintiff to prove a discriminatory motive; the EPA does not. Title VII requires a plaintiff to submit a complaint to the Equal Employment Opportunity Commission ("EEOC") before filing a court case; the EPA does not. The EPA requires plaintiffs to prove they performed substantially equal work as their comparators; Title VII does not. Additionally, an action under the EPA must be filed within two years of the discriminatory pay practice as compared to a Title VII charge which must be filed with the EEOC within 180 or 300 days (depending on the state).

Recently in *Lenzi v. Systemax, Inc*.,[7] the Second Circuit Court of Appeals "clarified" the two distinct frameworks used for analyzing cases under the EPA and Title VII. The plaintiff, Danielle Markou (Lenzi), worked as a risk management executive at Systemax. Markou raised concerns that she was not paid equally relative to her male peers. Despite the fact that Markou received several salary increases, she was still paid below market rate while her male executive level peers in different departments were paid salaries that far exceeded market rates for their positions. Systemax terminated her employment after scrutinizing an expense report Systemax alleged did not conform to company policy. Markou filed suit claiming violations under the EPA and Title VII and various other laws. The district court held that her Title VII pay discrimination claim failed because she did not

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[4] 29 U.S.C. § 206(d)(1).
[5] *Id*.
[6] 42 U.S.C. § 2000e-2(a).
[7] *Lenzi v. Systemax, Inc.*, 944 F.3d 97 (2d Cir. 2019).

establish that the job positions held by her purported male comparators were substantially equal to her position as required by the EPA.

On appeal, the Second Circuit held that the district court erred in applying the EPA framework to claims under Title VII. The Second Circuit clarified "that, to establish a prima facie pay discrimination claim under Title VII, a plaintiff need not first establish an EPA violation—that is, that she performed equal work but received unequal pay. Rather, 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.'"[8] The Court of Appeals stated that showing a male comparator was paid more than her was one way of proving that her employer discriminated against her *because* of her sex under Title VII but it was not the only way to prove pay discrimination under Title VII. The court therefore remanded Markou's Title VII pay discrimination claim for further proceedings using the correct Title VII framework.

As a result of the *Lenzi* decision, in the Second Circuit – which includes federal courts of New York, Connecticut, and Vermont – a claim for sex-based pay discrimination can be brought under Title VII even though no member of the opposite sex holds a substantially equal position, provided that the challenged pay rate is not based on any factor other than sex. Other courts could adopt this same framework.

B. State Equal Pay Legislation

Equal pay has been a key issue for states as well. Forty-eight states have enacted or amended state legislation to supplement the protections against pay discrimination under federal EPA and Title VII.[9] The first states to adopt equal pay legislation were California[10], New York[11], and Massachusetts[12]. Over the last several years, employers have witnessed a flood of state legislation that adopts new and more expansive pay equity laws.[13]

Expansion of the Classes of Protected Employees. While the EPA only covers wage discrimination based on sex, many state laws now protect against wage discrimination on the basis of race, ethnicity, and other protected classes.[14] New Jersey's Equal Pay Act, which is now considered one of the most protective equal pay laws, covers wage discrimination under all protected classes, including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status,

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[8] *Id.* at 103.
[9] *See* Pay Equity Interactive Map, available at https://www.fisherphillips.com/equity#Main.
[10] Cal. Labor Code § 1197.5.
[11] N.Y. Labor Law § 194.
[12] Massachusetts Gen. Laws Ch. 149 105A.
[13] See Lonnie Giamela, LaLonnie Gray, and Christine Lyman, *Mind the Gap: Practical Solutions to Minimize Pay Equity Claims* (Dec. 2019), available at https://www.fisherphillips.com/assets/htmldocuments/F_Lyman-ACC-Docket-December-2019.pdf.
[14] See Kathleen Caminiti and Sarah Wieselthier, *Web Exclusive – Incorporating Pay Equity Reviews in Your Year-End Compensation Practice* (Sep. 30, 2019), available at https://www.fisherphillips.com/resources-newsletters-article-incorporating-pay-equity-reviews-in-your-year.

domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.[15]

Expansion of Comparators. Many of the new state laws also expand who can serve as a proper comparator for comparing compensation. The EPA requires that employees alleging equal pay discrimination must be compared to a member of the opposite sex that works *within the same establishment*. Whereas, the California Fair Pay Act[16], for example, allows comparison between employees that work in different locations, including locations in different counties and even other states. Thus, California's expansion of coverage allows an employee to argue that their pay should be compared against employees in different geographic locations. The New York Pay Equity Act finds middle ground between the EPA and the California Fair Pay Act by defining the "same establishment" to include all locations in a geographic region no larger than a county.[17]

The expansion of comparators also includes an expanded scope of work. The EPA requires that comparators must perform "equal work," which the EEOC has interpreted to mean substantially equal work when looking at the "contents" or requirements of the jobs.[18] It is the job requirements, not job titles, that determine whether the jobs are substantially equal.[19] In comparing the job requirements, the level of skill, effort, and responsibility necessary to do the work must be considered. For example, suppose that men and women work side by side on an assembly line. However, the person at the end of the line must also lift the product onto a truck. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.[20] While most state laws also consider the skill, effort, and responsibility of the jobs in determining whom are proper comparators, many states are requiring a lesser degree of similarity. For example, under the Massachusetts Equal Pay Act, a showing of "comparable work" requires that the job require substantially *similar* (rather than substantially *equal*) skill, effort, and responsibility and be performed under similar working conditions.[21] The California Equal Pay Act also requires "substantially similar work" when viewed as a "composite" of skill, effort,

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[15] Diane B. Allen Equal Pay Act, N.J.S.A § 10:5-12; *see also* Kathleen Caminiti, *Pay Equity in New Jersey, One Year Later* (Jun. 7, 2019), available at https://njbmagazine.com/njb-news-now/pay-equity-in-new-jersey-one-year-later/.

[16] California Fair Pay Act, Cal. Labor Code § 1197.5; Cal. Labor Code § 432.3.

[17] Achieve Pay Equity Law, N.Y. Labor Law § 194.

[18] *Facts About Equal Pay and Compensation Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.

[19] *Id*.

[20] *Facts About Equal Pay and Compensation Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.

[21] Massachusetts Equal Pay Act, Massachusetts Gen. Laws Ch. 149 105A.

and responsibility.[22] While the terminology may seem similar, the interpretation by the courts can vary and is often a very fact intensive analysis.

Narrowing of Affirmative Defenses. The "catch-all" affirmative defense under the EPA permits wage differentials between the sexes based on any other factor other than sex. Over the past several years, states have expanded the protections of the equal pay laws by narrowing, or even eliminating, affirmative defenses available to employers in pay discrimination cases. Massachusetts has eliminated the catch-all affirmative defense in its entirety.[23] New York has not eliminated the catch-all defense but has significantly narrowed employers' ability to justify differences in pay under that exception. Under New York's new pay equity law, employers must prove that the pay differential was based on "a *bona fide* factor other than sex such as education, training, or experience."[24] This *bona fide* factor cannot be based upon or derived from a sex-based differential in compensation, and must be job-related with respect to the position in question and consistent with business necessity.[25] However, an employee can overcome the affirmative defense by demonstrating: (1) the employer's practice causes a disparate impact on the basis of sex, (2) an alternative practice exists that would serve the same purpose and not cause a differential, and (3) the employer has refused to adopt that alternative practice.[26] The EPA does not allow an employee to overcome the affirmative defense with such rebuttal evidence.

The California Equal Pay Act also makes it more difficult for employers to take advantage of affirmative defenses and justify pay disparities because employers have the burden to prove that any wage differential is due to factors other than sex that, when taken together, explain the entire wage differential.[27]

Salary History and the Catch-All Exception. Many states are limiting employers' ability to seek and use salary history in making compensation decisions. Another recent trend that has developed is the adoption of state legislation specifically aimed at preventing employers from requesting salary history information when making hiring decisions. Most recently, New York and New Jersey have enacted laws prohibiting employers from inquiring about or relying on an applicant's salary history information when determining compensation.[28] California's salary history ban allows employers to only review publicly available salary information, rely on salary information that is voluntarily disclosed by the

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[22] California Fair Pay Act, Cal. Labor Code § 1197.5.
[23] Massachusetts Equal Pay Act, Massachusetts Gen. Laws Ch. 149 105A.
[24] N.Y. Lab. Law § 194(1)(d).
[25] *Id.*
[26] *Id.*
[27] California Fair Pay Act, Cal. Labor Code § 1197.5.
[28] Sarah Wiesethier, *YEAR-END REMINDER: New Jersey's Salary History Ban Takes Effect January 1, 2020* (Nov. 20, 2019), available at https://www.fisherphillips.com/resources-alerts-year-end-reminder-new-jerseys-salary-history; Melissa Camire, *New York Rings in the New Year with New Workplace Laws* (Dec. 9 , 2019), available at https://www.fisherphillips.com/resources-alerts-new-york-rings-in-the-new-year.

applicant, and to ask about the applicant's salary expectations for the new position.[29] These laws are aimed specifically at combating perpetual pay inequities that can arise from employers relying on salary history in making compensation decisions. Studies have shown that pay discrimination can follow employees, particularly women, from job to job throughout their careers, resulting in a systemic reduction in their earning power over time.[30]

There is currently a split among the circuit courts as to whether an employee's salary history qualifies as a "factor other than sex" that may justify the pay differential.[31] The use of salary history will be examined further in section (B)(iii)(2).

Safe Harbors. Massachusetts, Oregon, Puerto Rico and Colorado have each tried to encourage employers to be proactive in identifying and remedying unlawful pay differences by offering safe harbors to employers who conduct self-evaluations in the form of affirmative defenses and/or by limiting the amount of damages available to a successful plaintiff.[32]

Expansion of Statutes of Limitations and Damages. The statute of limitations under the EPA also differs from the statutes of limitations under some state laws. Under the EPA, damages will go back two years and, in the event of a willful violation, three years.[33] While most state equal pay actions must be filed within two years of the violation, New Jersey claims have a statute of limitation reaching back to up to six years.[34] Some states also allow employees to recover liquidated damages at the amount of up to three times the pay differential.[35]

Expansion of Pay Transparency. Lastly, many states, including California and New York, have adopted anti-pay secrecy laws that prohibit employers from requiring that employees not disclose or discuss their wages with other employees. Pay secrecy can contribute to the gender wage gap by preventing employees from challenging the wage disparity because employees are unaware that one exists.

The differences between the state and federal pay equity laws are significant. Even more significant, however, are the differences between the laws of each state. The rising tide of state pay equity laws

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[29] Benjamin Ebbink, *California Employers Face Significant New Requirements* (Oct. 16, 2017), available at https://www.fisherphillips.com/resources-alerts-california-employers-face-significant-new-requirements.

[30] Jocelyn Frye and Robin Bleiweis, *Rhetoric vs. Reality: Making Real Progress on Equal Pay*, Center for American Progress (Mar. 26, 2019), available at https://www.americanprogress.org/issues/women/reports/2019/03/26/467778/rhetoric-vs-reality-making-real-progress-equal-pay/.

[31] *See* Cheryl Behymer, Kathleen Caminiti, and Cheryl Pinarchick, *Pay Equity Co-Chairs Discuss Supreme Court's Pay Bias Ruling* (Mar. 15, 2019), available at https://www.fisherphillips.com/resources-articles-pay-equity-co-chairs-discuss-supreme-courts.

[32] Massachusetts Equal Pay Act, Massachusetts Gen. Laws Ch. 149 105A(d);Or. Rev. Stat. § 652.220(2); Equal Pay Act of Puerto Rico, Law No. 16-217; Equal Pay for Equal Work Act, SB 19-085 (effective Jan. 1, 2021).

[33] 29 U.S.C. § 255(a).

[34] N.J.S.A. § 34:11-58.

[35] Achieve Pay Equity Law, N.Y. Labor Law § 194.

makes compliance for multi-state employers even more challenging and increases the risk of potential lawsuits.

II. Case Developments

A. Proving the Prima Facie Case

The court imposes a burden-shifting framework for claims under the EPA. First, an employee alleging an EPA violation has the burden of establishing a prima facie case. To do so, the employee must prove (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.[36] An employee does not need to show that the job of the opposite-sex comparator is identical or even that the employee shared the same job title as their opposite-sex comparator. It is sufficient for the plaintiff to show that the jobs are substantially equal when inquiring into the job duties of the employees. Further, claims under the EPA can be brought by both women and men.

If the plaintiff can establish their prima facie case, the burden shifts to the employer to allege that the pay differential is based on a legitimate, non-discriminatory reason. Specifically, the EPA provides 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) any factor other than sex.[37] The fourth defense, "any factor other than sex" is a catchall provision that allows employers to form their own business-specific reason for the pay differential. Courts have continuously held that employers have a "heavy burden" in proving affirmative defenses under the EPA.[38]

If an employer meets its burden to establish an affirmative defense, the employee has an opportunity to show that the employer's explanation for the wage differential is merely a pretext for discrimination.

1. Establishing a Wage Disparity

The first element of the prima facie case that a plaintiff must establish is that a wage disparity exists. In a single-plaintiff case, this means identifying comparators of the opposite sex that are paid at a higher rate than the plaintiff. However, in class actions cases it can be more burdensome to show that a wage differential exists. Often in large EPA class action cases, plaintiffs produce statistical evidence to show that employees were paid less than their comparators. Using statistics is only one way to allege a pay disparity, plaintiffs may also choose to allege a companywide policy (e.g. using prior salaries to perpetuate discrimination) is the basis for the discrimination.

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[36] 29 U.S.C. § 206(d).
[37] *Id*.
[38] *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358 (11th Cir. 2018).

In class action EPA claims, statistics are often used by the plaintiffs to show that the class meets the requirements for class certification. For example, in *Bridewell-Sledge v. Blue Cross of California*,[39] each party presented competing expert reports based on statistics. The court used the expert reports to determine if the plaintiff's proposed class merited certification. The plaintiffs attempted to use statistical evidence to establish that there was a common pay practice across the entire class to merit class treatment. The court concluded that the plaintiffs' experts did not group similar employees together. Specifically, the plaintiffs grouped employees by EEO job group, which failed to account for the specific job duties and education requirements for the positions. Ultimately, the court denied the motion for class certification and concluded certification was inappropriate because it would require the court to analyze each job position individually. To do this, the court would need to conduct an individual review of whether the proposed class perform substantially equal work under similar working conditions. Thus, this case demonstrates that plaintiffs cannot get around the requirements of alleging appropriate comparators, even on a class-wide basis.

Employers have been successful in asserting challenges against plaintiffs' statistical model in order to narrow down the class of plaintiffs. In *Kassman v. KPMG, LLP*,[40] plaintiffs attempted to use statistical evidence to show that there is a difference in compensation between men and women, demonstrating a violation of the EPA. The plaintiff's expert controlled for factors such as job level, experience, and job location. However, the court agreed with the employer's statistical model that showed no pay disparity when controlling for the job category. The results of this case further stress the importance of incorporating proper comparators into an employer's statistical analysis.

Additionally, for a class action to proceed, there must be a question of law or fact that is common to the class. Typically, plaintiffs will use statistics to allege a common pay practice exists across the entire class. For example, in *Wal-Mart, Inc. v. Dukes,*[41] the plaintiffs attempted to certify a proposed nationwide class of over 10,000 female employees. Both parties agreed that a common process existed for determining wages. However, the plaintiffs argued that the common practice for pay decisions was based on the managers' individual, discretionary decisions. In reviewing the plaintiffs' EPA claim, the court denied certification stating that the centralized procedures for determining pay did not influence the managers' independent discretion. Thus, a common practice did not exist to warrant class certification.

Statistics can also be relevant in defending single-plaintiff EPA cases. In *Spencer v. Virginia State University*,[42] the court held that a sociology professor at Virginia State University could not show that

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[39] *Bridewell-Sledge v. Blue Cross of Cal.*, No. BC477451 (Los Angeles Sup. Ct. Aug. 28, 2018) (Court's Ruling and Order re: Pls.' Mot. For Class Certification).

[40] Kassman v. KPMG LLP, No. 11 CIV. 3743 (LGS), 2018 WL 6264835 (S.D.N.Y. Nov. 30, 2018).

[41] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

[42] *Spencer v. Va. State Univ.,* No. 3:16-CV-989-HEH, 2018 WL 627558 (E.D. Va. Jan. 30, 2018).

her job duties were substantially identical to her male comparators' job duties. The plaintiff attempted to show her proper comparators were (1) a tenured professor in the sociology department, (2) an associate professor in the mass communication department, and (3) an associate professor in the department of education leadership. In support, the plaintiff presented statistics to demonstrate that she was paid less than her male counterparts. The court dismissed all three possible comparators as improper because the job duties and requirements as to each department were vastly different. But the court also held that the analysis performed by the plaintiff's own expert showed that the University did not suffer from any systemic gender-related wage disparity. Among other things, the plaintiff's expert determined that the 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. The 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."

Finally, the timing of the alleged wage disparity matters. For example, in *Joo v. University of Miami*, the plaintiff, Dr. Sung Hee Joo, filed a lawsuit alleging her male colleagues were paid more for performing substantially equal work. The district court dismissed one of the male comparators because the alleged discriminatory pay received was only for the period beyond the statute of limitations. The court determined that the plaintiff's comparison to this male comparator was therefore time-barred because the plaintiff "may only recover for discriminatory pay received within the statute of limitations period."[43]

2. Showing that Work is "Equal" or "Substantially Similar"

Under element two of the plaintiff's prima facie case, a plaintiff must establish that they were paid less for equal work that requires equal still, effort, and responsibility, and which are performed under similar working conditions. As noted above, it can be difficult to determine how the courts define "equal pay." Regardless of the standard used under the EPA or a similar state statue, plaintiffs must still meet the requirement that they show they perform similar work as their comparator.

In *Miller v. City of New York*,[44] the court dismissed a class action of plaintiffs alleging a violation under the EPA. The plaintiffs were a group of 2,000 female crossing guards, who claimed that they were paid less than their male enforcement officers for the same work. A New York City federal judge determined that the two positions, crossing guards and traffic enforcement agents, were too dissimilar to warrant comparison. The judge noted that the responsibilities and working conditions were vastly different between the two positions, including traffic enforcement agents undergo significantly more training, they are full-time employees that are required to work nights and weekends, and traffic

[43] *Joo v. University of* Miami, 2019 WL 7376765 (S.D.Fla. 2019).
[44] *Miller v. City of New York*, No. 15-CV-7563, 2018 WL 2059841 (S.D.N.Y. May 1, 20018).

enforcement agents work at busier intersections. The court rejected the plaintiffs' oversimplification of the two jobs which, as the plaintiffs defined, both groups as individuals who direct the flow of pedestrians and traffic. The following key differences between the positions provided the basis for the court's reasoning: (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 greater responsibilities, including issuing summonses and testifying in court, and (4) they work at different, often busier intersections and sometimes at night.

Similarly, in *Spencer v. Virginia State Univ.*, the plaintiff, a female sociology professor, brought an action against Virginia State University alleging violations of Title VII and the EPA based on the defendant paying the plaintiff less than two male professors in other departments.[45] The plaintiff earned a salary of $70,000, while her male comparators both earned salaries over $100,000. The University alleged that the difference is explained by the fact that the plaintiff's position requires different skills than her male comparators' positions, and both male comparators have former administrative experience, while she does not. The Fourth Circuit affirmed the lower court's decision that the plaintiff failed to prove her prima facie case because her male comparators worked in different departments that called for a different skill set and different hours requirements. Additionally, one of the male comparators taught graduate level classes while the plaintiff only taught undergraduate classes. One comparator also supervised doctoral dissertations, and both comparators worked more hours than the plaintiff did.

The most common comparator for a plaintiff to use is another individual currently employed by the company in the same or similar position. However, courts have expanded the group of potential comparators to former employees who held the same or similar position. For example, in *Kling v. Montgomery County, Maryland*,[46] the plaintiff held the position of a Hispanic Liaison for the Montgomery County Police Department. The plaintiff attempted to compare her work to a male comparator who was previously employed in a similar role in the police department. The court ultimately held that, while the male comparator's prior job shares commonalities with the plaintiff's current position, the differences precluded the plaintiff from proving a prima facie case. However, the court allowed the plaintiff to compare herself to the former employee – demonstrating that plaintiffs *may* use former employees as a proper comparator to establish a prima facie case.

In *Heatherly v. University of Alabama Board of Trustees,*[47] the court held that a shared performance evaluation process, alone, could not be used to establish a prima facie EPA violation. In this case, the plaintiff, a director of human resources, brought a claim under the EPA claiming that she was paid

[45] *Spencer v. Virginia State Univ.,* 919 F.3d 199 (4th Cir. 2019).
[46] *Kling v. Montgomery Cnty., Md.,* 324 F. Supp. 3d 582 (D. Md. 2018).
[47] *Heatherly v. Univ. of Ala. Bd. Of Trs.*, No. 7:16-CV275-RDP, 2018 WL 3439341 (N.D. Ala. July 17, 2018).

less than three male employees who held director-level positions. The plaintiff claimed that the university used a job evaluation 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. Because that system established the same pay grade for her position versus those of her comparators, the plaintiff claimed this establish the "equal work" element of her prima facie case. The court disagreed, holding that this system - alone - did not establish that the positions were properly compared to each other. Rather, courts must look at actual job duties including the skill, effort, and responsibilities required for the position. Courts cannot merely rely on a job evaluation system.

Even at the pleadings stage, courts may dismiss EPA claims for failure to satisfy the "equal work" prong. For example, in *Kairam v. W. Side GI, LLC,* the plaintiff filed an EPA claim based on her employer's failure to pay her a salary of $100,000 for administrative billing work while paying her male comparator a $100,000 salary for his administrative work.[48] The plaintiff alleged specifics regarding her own duties, but all the plaintiff alleged with respect to the comparator was that he ran the practice, "which involved administrative duties." The district court granted the defendant's motion to dismiss, determining that the complaint failed to sufficiently allege that the plaintiff's position was substantially equal to her comparator's. On appeal, the Second Circuit affirmed, reasoning that it is not sufficient to only allege that the plaintiff and comparator performed "administrative work." According to the Second Circuit, this single, general allegation "does not allow for even a reasonable inference that the content of the two positions was substantially equal."

B. Disproving Discrimination: Affirmative Defenses

Under the EPA framework set forth above, employers have four potential affirmative defenses to justify any alleged pay discrimination: (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 than sex.[49] An employer has the burden to establish an affirmative defense. Under California's Fair Pay Act, a "factor other than sex" means "a bona fide factor, other than sex, such as education, training, or experience."[50] The statue further clarifies that this factor shall be applied only if the employer demonstrates that the factor is job related and consistent with business necessity.[51] California employers face a heavy burden in proving affirmative defenses because they must explain the complete wage differential between sexes. Finally, the California Fair Pay Act does not allow the use of prior salary history to be included within the "other factor" affirmative defenses. Because this factor is so broad it is worth individually considering.

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[48] *Kairam v. W. Side GI, LLC,* 2019 WL 6691512 (2d Cir. 2019).
[49] 29 U.S.C. § 206(d).
[50] California Fair Pay Act, Cal. Labor Code § 1197.5.
[51] *Id*.

1. Proving A Factor Other Than Sex

The fourth affirmative defense under the EPA is a catchall defense that employers often rely on to show that any alleged wage differential was due to "any factor other than sex." Here, employers may point to factors such as prior education or experience of the comparator in order to justify the pay difference.

For example, in R*uiz-Justinano v. U.S. Postal Services,*[52] a male postal worker claimed that he was paid less than his female comparators. The U.S. Postal Services argued that the wage differential was based on a salary guideline in place at the time of the comparator's hire – which allowed her to be given an offer up to five percent higher than her prior private sector salary. The district court held that a salary guideline that allows for independent determination of an applicant's pay upon hire constitutes a factor other than sex. While the plaintiff contended that the reasoning for the guideline – to stay competitive in outside hiring – was pretext for termination, the court determined 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."

Further, in *Ackerson v. Reactor and Visitors of the University of Virginia*,[53] the defendant employer argued that the plaintiffs and comparators were paid at different rates because the comparators' background, experience, and achievements exceeded that of the plaintiffs. The court refused to undertake that analysis, concluding that the defendant did not present sufficient evidence that a factor other than sex actually explains the wage differential. The court determined 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."

2. The Use of Salary History as A Legitimate Factor Other Than Sex

Currently, there is debate about whether an applicants' prior salary history can be used as a factor other than sex to explain the wage difference between the plaintiff and the comparator. Many employers take the view that salary history can be used as a valuable tool when assessing the prior experience and skill of the applicant. However, many courts have taken the contrary position that determining an applicant's starting pay based on prior earnings perpetuates that wage gap that exists because the initial salary that was offered was likely below the market value for the position. In federal courts, there is currently a circuit split on the issue. Under the EPA, whether compensation decisions based upon salary history are lawful depends, at least for now, on which jurisdiction's law applies.

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[52] R*uiz-Justinano v. U.S. Postal Services*, 2018 WL 3218363 (D.P.R 2018).

[53] *Ackerson v. Reactor and Visitors of the Univ. of Va.*, No. 3:17-CV-11, 2018 WL 3209787 (W.D. Va. June 27, 2018).

In *Rizo v. Yovino*,[54] the Ninth Circuit, sitting *en banc*, held that the County's use of prior salary history violated the purpose behind the EPA. In this case, the County used guidelines to determine which salary range an applicant would begin at based in part on their prior salary. The plaintiff automatically started at the lowest salary range because of her prior salary. Her male comparators started at higher salary ranges despite similar prior experience, because their prior salary was more than the plaintiff's. The court held that using prior salary data cannot be used as a way of justifying the pay differential between opposite sexes. This decision reversed the prior decision in *Kouba v. Allstate, Ins. Co.,*[55] which allowed prior salary data to be used as a factor other than sex. Adding to the complexity, before the Ninth Circuit's decision in *Rizo* was published, one of the authors of the decision, the Honorable Stephen Reinhardt, passed away causing his vote in the decision not to be counted towards the majority. As such, the Supreme Court vacated the *Rizo* decision without considering the merits of the case. This left much uncertainty whether employers could rely on prior salary data. However, this problem was solved, in part, for California employers by AB 168. On January 1, 2018, California's salary ban took effect, prohibiting employers from seeking or relying upon salary history information.

At the other extreme, the Seventh Circuit Court of Appeals held that prior salary is *always* a "factor other than sex" that justifies a pay disparity between male and female employees.[56] In *Lauderdale v. Illinois Department of Human Services,*[57] the Seventh Circuit Court held it did not violate the EPA for an employer to explain the wage differential based, in part, on the employees' prior salary history. The court additionally noted that precedent in the seventh circuit has consistently determined that prior salary history is included as a factor other than sex.

Other Circuits have taken more of a middle-ground approach, clarifying that prior salary may be considered as long as it is not the only factor in determining pay. For example, the Tenth Circuit determined that an employer may decide to pay an elevated salary to an applicant who rejects a lower offer, but the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity."[58] Similarly, the Eleventh Circuit, noted that "while an employer may not overcome the burden of proof on the affirmative defense of relying on 'any factor other than sex' by resting on prior pay alone, . . . there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience."[59]

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[54] *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017).
[55] *Kouba v. Allstate, Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).
[56] *See Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468–70 (2005).
[57] *Lauderale v. Ill. Dep't of human Servs.,* 876 F.3d 904 (7th Cir. 2017).
[58] *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).
[59] *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

3. Other Affirmative Defenses

While the "factor other than sex" affirmative defense, gives employers the opportunity to explain the pay difference, other defenses are also available to employers.[60] As with all of the affirmative defenses, employers should have a written policy to determine pay increases based on merit or seniority systems and take proactive steps to carefully document an individual's eligibility for these systems. This will prevent employees from later arguing that the vague guidelines of the merit or seniority systems were, in fact, a pretext for pay discrimination.

For example, in *Brunarski v. Miami University,*[61] the court held that the employer's merit system was vague and inconsistently applied to employees. Therefore, the merit system could not be used as an affirmative defense for employers. In this case, female professors claimed that they were paid less than their male comparators for similar work. The University attempted to justify the pay differential by raising the affirmative defense that a merit system existed within the University that justifies the pay differential. In doing so, the University argued that the comparators received merit-based raises that were higher than the female plaintiffs because of their performance reviews. The court determined that the University had inconsistently applied the merit system in a way that disadvantaged female professors. The court concluded that although the University claimed that they had legitimate, business justification and based the merit system off of certain factors such as performance and involvement in the study abroad program, the University failed to support their claim with evidence showing that these factors actually played a part in determining the merit raises. This case demonstrates the critical importance for employers to determine set standards for merit and seniority systems in advance and then apply to those standards in a gender-neutral way.

Considering the importance of documentation, the Third Circuit in *Summy-Long v. Pennsylvania State University*,[62] affirmed the dismissal of the plaintiff's claims because the plaintiff failed to present sufficient evidence in her prima facie case and there were numerous items in the record that "reflected a lack of academic performance in comparison to her colleagues." The employer submitted evidence that the plaintiff had been urged but failed to increase publications and obtain funding to support her research. The record also established that the plaintiff failed to apply for a grant even after being reminded for three years by a supervisor. This evidence greatly helped the court to determine that the plaintiff's academic performance in comparison to her colleagues was greatly lacking.

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[60] 29 U.S.C. 206(d)(1)(iv).
[61] *Bunarski v. Miami Univ.*, No. 1:16-CV-311, 2018 WL 618458 (S.D. Ohio Jan. 26, 2018).
[62] *Summy-Long v. Penn. State Univ.*, 226 F. Supp. 3d 371 (M.D. Pa. 2016).

4. Pretext

If the employer is able to meet their burden by demonstrating that there was a legitimate, nondiscriminatory reason for the wage disparity, then the burden shifts back to the plaintiff to prove that the defendant's proffered explanation is merely a pretext for discrimination. To do so, the plaintiff may allege that the reason was (1) factually baseless, (2) it was not the employer's actual motivation, (3) insufficient motivation, or (4) it was otherwise pretextual. A plaintiff's greatest strength in proving that the proffered reason was a pretext for discrimination is pointing out inconsistencies in the decision maker's deposition testimony. This alone can be the downfall of the employer's case.

In *Fortenberry v. Gemstone Foods, LLC*,[63] the court allowed an equal pay lawsuit to proceed to trial despite the employer's presentation of an allegedly legitimate basis for the difference in pay. The plaintiff was hired by Gemstone Foods as a purchasing assistant and was later promoted to purchasing manager. The plaintiff alleged that she was required to work on weekends without any additional pay, and that when the male managers worked on weekends they received additional pay. The employer argued that the positions could not be compared because the plaintiff was a purchasing manager while her male comparators were production managers. Additionally, the employer claimed that only roles essential to production would receive pay on the weekends. However, the plaintiff pointed to evidence that a male maintenance manager received pay on the weekends even though the job was not essential to production. This contradiction served as a basis for the plaintiff to show that the reason offered by the employer was a pretext for pay discrimination.

In contrast, in *Hornsby-Culpepper v. Ware*,[64] the Eleventh Circuit held that a pretext analysis depends on whether the plaintiff can prove that the employer possessed a discriminatory "state of mind." The plaintiff, a county clerk, claimed that she was paid a lower salary than her male predecessor in the position. In response, the employer raised three legitimate nondiscriminatory reasons why the plaintiff was paid less, including budget constraints and the fact that the plaintiff was previous terminated from the position. Ultimately, the court held that the plaintiff had failed to establish a pretext for discrimination because the plaintiff could not prove that the employer's reasons were false or that the employer possessed an additional discriminatory reason for the pay differential. The court reasoned 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."

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[63] *Fortenberry v. Gemstone Foods, LLC,* No. 5:17-CV-1608-AKK, 2018 WL 6095196 (N.D. Ala. 21, 2018).
[64] *Hornsby-Culpepper v. Ware*, 906 F.3d 1032 (11th Cir. 2018).

III. Significant Class Action Decisions

In class action litigation, plaintiffs must persuade the court that the class meets certain requirements and that it should be decided on a class-wide basis rather than given individual treatment. 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"). This is advantageous for plaintiffs, as the standard applied at the conditional certification stage of an FLSA collective action is much more lenient that the standards applied to certify a class action under Rule 23 of the Federal Rules of Civil Procedure.

Under the FLSA, the employees can proceed "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[65] At the certification stage, the court does not make a final decision about whether class treatment is appropriate. Rather, the court makes a preliminary analysis and then provides the employer the opportunity to decertify the collective action. Most district courts use a two-step approach for analyzing class action certification under the EPA. First, the plaintiffs must show merely some factual basis from which the court can determine if similarly situated plaintiffs exist. This burden is not difficult for plaintiffs to satisfy. Many employers dislike this standard for providing a more lenient route to class certification. If the conditional class certification is granted, the court will than make a decision under the second step, which involves the court examining a more complete record to determine whether the opted-in plaintiffs are actually similarly situated to the named plaintiffs.

The cases below are examples about how courts apply the aforementioned framework in EPA cases.

(1) *Bertroche v. Mercy Physicians Association, Inc.* 2018 WL 41079909 (N.D. Iowa Aug. 29, 2018).

The plaintiffs, female physicians, brought a class action against Mercy Physicians Association alleging pay discrimination. The plaintiffs alleged that they all performed the same job duties and were all subject to the same compensation system. The court ordered parties to compile statistical evidence demonstrating whether the average salary of male physicians was above the average salary of female physicians. The parties disagreed on who were proper comparators to include within the statistics. The plaintiffs' statistical analysis showed a severe pay discrepancy between sexes. Mercy Physician Association, in turn, argued that the difference on pay was based on the individual physicians' "production quantity and quality." However, the court held that at the class certification stage, plaintiffs do not need to show that the pay differential was based on discrimination. Rather, it

[65] 29 U.S.C. § 216(b).

was enough to merely show that the wage differential existed based on gender. Thus, the plaintiffs' statistics sufficed to satisfy their burden.[66]

(2) *Ahad v. Bd. of Trustees of S. Illinois Univ.*, 2019 WL 1433753 (C.D. Ill. 2019).

The plaintiffs filed a lawsuit against the Board of Trustees of Southern Illinois University and SIU Physicians & Surgeons, Inc., alleging gender-based pay discrimination under the EPA, Illinois EPA, Title VII, and Illinois Civil Rights Act. The plaintiffs alleged that the defendants paid the plaintiffs and other female physicians substantially lower compensation than male physicians for similar work. The class was conditionally certified. SIU moved to decertify the EPA class action by arguing that the plaintiffs were not similarly situated, that individual inquires predominated, and that there was no common practice or policy. The court decertified the class based on the fact that hiring decisions and compensation were based on individual factors that would require an individual analysis.[67]

(3) *Finefrock v. Five Guys Operations, LLC*, 344 F. Supp. 3d 783 (M.D. Pa. 2018).

In *Finefrock*, the employer used a pay determination process that new hires for the company's manager positions were paid the same salary as the person who previously held the position. During the process, the district manager would set salaries for all of the franchises in the area, with approval from the area manager, director of operations, and the vice present of operations. Plaintiffs claimed that they established their burden for class certification of merely showing that the pay differential was different between sexes under this common policy. However, the defendants argued in opposition that the EPA only addressed pay differentials within the same "establishment" and because district managers spanned across several locations, this was not the same "establishment." The court held that the employer's locations could be considered a single establishment under the EPA because of the common policies and the evidence presented that managers worked at multiple locations.[68]

(4) *Ellis v. Google, Inc.,* No. CGC-17-561299 (Cal. Super. Ct. Dec 4, 2017).

The plaintiffs, women employed at Google's headquarters, sought conditional class certification in a pay equity class action under the EPA. The plaintiffs held a variety of job positions ranging from low-level positions to top-ranking executives. The plaintiffs claimed that Google has a common practice of paying women lower than their male peers and keep women in job positions that hindered their ability for advancement. At the class certification stage, the court initially determined the class was over inclusive to warrant class treatment. The plaintiffs amended their complaint by categorizing job positions into six families and alleging that Google's practice of using prior salary data to determine pay perpetuated the wage discrimination. The court determined the plaintiffs' class definition sufficed

[66] Bertroche v. Mercy Physicians Association, Inc. 2018 WL 41079909 (N.D. Iowa Aug. 29, 2018).
[67] Ahad v. Bd. of Trustees of S. Illinois Univ., 2019 WL 1433753 (C.D. Ill. 2019).
[68] Finefrock v. Five Guys Operations, LLC, 344 F. Supp. 3d 783 (M.D. Pa. 2018).

for class wide treatment and held that the plaintiffs' allegations of a common practice were sufficient to demonstrate common issues of fact.[69]

(5) *Morgan, et al., v. United States Soccer Federation*; Case No. 2:19-cv-01717-RGK-AGR

The plaintiffs are current and former members of the United States Women's National Soccer Team ("USWNT") who filed a federal gender discrimination class action lawsuit against the U.S. Soccer Federation. The Federation employs both the men's and the women's national teams. The lawsuit claims that it discriminates by paying the women less than their male counterparts and "by denying them at least equal playing, training, and travel conditions; equal promotion of their games; equal support and development for their games; and other terms and conditions of employment equal to the Men's National Team." The court granted class certification, rejecting the Federation's argument that the claim should not proceed because there was evidence that some of the members of the women's team, including the named class representative, "made significantly more money that the highest-paid men's national team player." The court reasoned that "Defendant's argument presupposes that there can be no discrimination under Title VII or the Equal Pay Act where a female employee's total annual compensation exceeds that of similarly situated males, regardless of whether the female employee receives a lower rate of pay than her male comparators."[70]

IV. Other Important Decisions Impacting Pay Equity Legislation

A. Retaliation Claims and Establishing the Causal Nexus

Since the EPA was incorporated as an amendment to the FLSA, the statute includes an anti-retaliation section that applies to plaintiffs who allege a violation under the EPA as well.[71] Under the FLSA, employers must not discharge or in any manner discriminate against any employee because the employee has engaged in protected conduct such as filing a complaint of wage discrimination.[72] For an employee to prove retaliation, they must establish a causal nexus between the plaintiff's protected activity and the adverse action. Typically, plaintiffs will look at timing to raise a presumption that the events were so close in time that the adverse action must be due to the plaintiff's protective activity. Here, an employer's best defense will be to show an independent reason for the adverse action or that the individual who made the decision of the adverse action did not know about the plaintiff's complaint.

If a significant time has passed after the plaintiff's protected activity and the adverse action, courts are less likely to infer retaliation. For example, in *Yearns v. Koss Construction Co.*,[73] the court held that

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[69] Ellis v. Google, Inc., No. CGC-17-561299 (Cal. Super. Ct. Dec 4, 2017).
[70] Morgan, et al., v. United States Soccer Federation; Case No. 2:19-cv-01717-RGK-AGR.
[71] 29 U.S.C. § 215(a)(3).
[72] *Id*.
[73] *Yearns v. Koss Constr. Co.*, No. 17-CV-4201-C-WJE, 2019 WL 191656 (W.D. Mo. Jan. 14, 2019).

the length of time between the plaintiff's protected activity and the adverse employment action is crucial to the determination of causation. The plaintiff, a general laborer and traffic controller for a construction company, claimed that she was terminated because she raised the allegation of unequal pay to her employer. The court established that the plaintiff had failed to allege a causal connection between the two events for several reasons. Among those reasons was the fact that over eight weeks passed from the alleged complaint to the time of termination.

Similarly, in *Coleman v. Schneider Electric USA*,[74] the Fourth Circuit held that the plaintiff failed to establish a causal connection between the time that the plaintiff filed an EEOC charge and her adverse employment action because the decision makers did not learn that the plaintiff filed an EEOC charge until the adverse action had already been taken. Additionally, the adverse action occurred more than one year after the plaintiff filed her EEOC Charge. The court determined the plaintiff's adverse action was too far removed from the protected activity to warrant any finding of causation.

In contrast, courts have repeatedly found that adverse actions taken shortly after the protected activity raises a strong presumption of causation. In *Donathan v. Oakley Grain, Inc.,*[75] the court held that a female plaintiff established a strong presumption of a causal connection where the plaintiff was terminated only eight days after she sent an email to the company's president alleging that she did not receive a bonus in line with other male employees in similar positions. Additionally, the plaintiff's termination occurred despite the fact that she did not receive any negative performance evaluations. Thus, the plaintiff sufficiently alleged a prima facie case of retaliation.

B. Arbitration Agreements

Arbitration agreements can be an effective way to prevent EPA class action litigation from reaching courts. An arbitration agreement with a class action waiver allows employers to compel the individual to litigate his or her claims in arbitration on an individual basis.[76] However, issues may arise when employers do not confirm that their arbitration agreements meet all the requirements of enforceability. This was directly addressed, in *Ramos v. Superior Court*.[77] In *Ramos*, the plaintiff filed suit after alleging discrimination, retaliation, and unfair pay practice. The defendant moved to compel arbitration arguing that the plaintiff had signed a valid and enforceable arbitration agreement. The court held that the arbitration agreement was unenforceable under *Armendariz,* because the arbitration agreement contained provisions, including that the arbitrators would have no authority to substitute their judgment over the determination of the Executive Committee of the law firm. The arbitration agreement also prevented the plaintiff from obtaining backpay, front pay, reinstatement, or punitive damages under the California Fair Pay Act. Finally, the court held that the provision requiring

[74] *Coleman v. Schneider Electric USA*, No. 18-1265, 2019 WL 141073 (4th Cir. Jan 9, 2019).
[75] *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735 (8th Cir. 2017).
[76] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[77] *Ramos v. Super. Ct.*, 239 Cal. Rptr. 3d 679 (Cal. Ct. App. 2018).

the plaintiff to pay half of the arbitration fees was unconscionable and, thus, voided the entire agreement.

In *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*,[78] a law firm partner alleged that Ogletree discriminated in pay practices, promotions, and opportunities available to females for advancement within the firm. The complaint alleged violation under the EPA and the California Fair Pay Act. The district court held that the plaintiff must arbitrate her claims despite the plaintiff alleging that the plaintiff did not know of the terms of the arbitration agreement. The court held that it was unnecessary to determine whether the plaintiff knew of the terms to be bound by the agreement. The plaintiff was bound by the nature of receiving the arbitration agreement, receiving email notification informing her about her ability to opt out, and agreeing to continue working without opting out of arbitration. Accordingly, the plaintiff was required to pursue her claims in arbitration.

Employers should consult outside counsel to determine if they have a valid, and enforceable arbitration agreement and whether the employer may offer mandatory arbitration agreements under state specific laws.

V. Federal Enforcement

A. EEO-1 Reporting Requirements

One of the most significant changes over the past several years are related to employers' obligations under EEO-1 reporting. The EEO-1 Report is a survey that has been maintained over the last 50 years that required employers with 100 or more employees, or federal contractors or subcontractors with 50 or more employees, to collect and provide to EEOC demographic information in ten categories of jobs. The data that employers must collect includes the gender, race, and ethnicity of employees. Employers must collect this data for the following ten categories: (1) Executive & Senior-Level Officials and Managers, (2) First/Mid-Level Officials & Managers, (3) Professionals, (4) Technicians, (5) Sales Workers, (6) Administrative Support Workers, (7) Craft Workers, (8) Operatives, Laborers, and Helpers, and (10) Service Workers.

On February 1, 2016, the EEOC proposed a more stringent requirement of the EEO-1 reporting for employers that would require employers to submit Component 2 pay data including data on the employee's earnings and hours worked. In 2017, the U.S. Chamber of Commerce asked the Office of Management and Budget ("OMB") to rescind its approval of the 2016 EEOC proposed requirements. One month later, the Equal Employment Advisory Council filed suit asking the OMB to reconsider their decision to support the additional requirements, noting concerns with the costs to employers

[78] *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:2018-CV-00304 (N.D. Cal. Jan. 12, 2018).

associated with compliance. The U.S. Chamber of Commerce estimated that it would cost employers and federal contractors $1.3 billion annually to comply with the requirement of Component 2.[79]

On August 29, 2017, the OMB stayed the EEOC's additional pay data collection, which would have been effective on March 31, 2018. However, on March 4, 2019, the District of Columbia Court held that OMB's stay of the EEOC's additional reporting requirements was unlawful and vacated the stay effective immediately. Once the EEO-1 reporting period began on March 18, 2019, the EEOC commented that with respect to the new reporting obligations under Component 2 the EEOC was working diligently on the next steps for employers to submit the data and would provide more information when possible.[80] The Court held a hearing on March 19, 2019, at which the court ordered the OMB and EEOC to submit plans addressing how they were going to comply with the new reporting requirements. In a follow-up hearing on April 16, the EEOC explained to the court that they could not satisfy the requirements if a delaine was imposed any sooner than September 30, 2019. Ultimately, the court confirmed that new deadline of September 30, 2019. The EEOC announced on September 11, 2019, that it would halt further collection of Component 2 pay data during future EEO-1 reporting cycles. However, it is possible that a court or future administration may intervene and force the EEOC to begin requiring Component 2 data in 2020 or beyond.[81]

B. Case Law Developments

The EPA can also be enforced by the EEOC. The EEOC has the ability to bring lawsuits on behalf of a class of aggrieved individuals without meeting the requirements for class certification. Over the past five years, the EEOC has consistently identified equal pay as one of its top priorities. [82]

For instance, in *EEOC v. Maryland Insurance Administration,*[83] the EEOC filed suit on behalf of three female fraud investigators claiming violations under the EPA. The EEOC alleged that the female employees were paid less than their male comparators within the same role, who had similar experiences to the female employees. In response, the Maryland Insurance Administration ("MIA") relied upon a pay system that set pay upon hiring. The district court found that the EEOC had not alleged sufficient comparators because the male comparators worked as enforcement officers, not fraud investigators, and has vastly different responsibilities than the female fraud investigators.

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[79] *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.

[80] Cheryl Behymer, *Employers Get A Pay Data Reporting Reprieve – But For How Long?*, (Mar. 18, 2019), available at https://www.fisherphillips.com/resources-alerts-employers-get-a-pay-data-reporting-reprieve.

[81] Cheryl Behymer, *Pay Data Collection May Just Be A One-Time Predicament* (Sept. 11, 2019), available at https://www.fisherphillips.com/resources-alerts-pay-data-collection-may-just-be-a.

[82] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, Fiscal Years 2017 – 2021, available at https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[83] *EEOC v. Md. Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018).

Additionally, MIA's presented a valid reason other than sex, the previously noted pay system, that explained any alleged pay differential.

However, the Fourth Circuit reversed, holding that there were genuine issues of material fact as to whether the EEOC had established their prima facie case. The court held that the male comparators' experience was relevant to the employer's affirmative defense. The district court erred when it considered this evidence as part of the plaintiffs' prima facie case. Further, the employer did not meet its heavy burden in establishing the affirmative defense of improper comparators "so convincingly that a rational jury could not have reached a contrary conclusion." Thus, the Fourth Circuit reversed the district court's grant of summary judgment.

The EEOC has often relied on administrative subpoenas to force employers to turn over company-wide pay data. For example, in *EEOC v. VF Jeanswear, LP*,[84] the EEOC investigated a single charge of pay discrimination. The EEOC argued that company wide information was necessary to compare data regarding promotion and termination to show that this data was directly correlated with the lack of promotion opportunities available for the female charging employee. However, the court concluded that this request for pay data was too far reaching and was not highly probative of the alleged discriminatory promotion and pay. Thus, the court concluded that a companywide collection of company-wide promotion and termination data was not relevant to the charging employee's alleged demotion because of her gender.

[84] *EEOC v. VF Jeanswear, LP*, No. MC-16-CV-47-PHX-NVW, 2017 WL 2861182 (D. Ariz. July 5, 2017).