SCOTUS Rejects Review Of Salary History Defense To Pay Equity Claims

Insights
7.06.20

The U.S. Supreme Court declined to weigh in on the question of whether employers can use prior salary history as a defense in equal pay claims, leaving an open question around the country about whether such a justification is a viable option. The July 2 action by the SCOTUS leaves intact the 9th Circuit's ruling rejecting such a defense, but also lets stand other rulings that seemingly permit employers to employ this reasoning in Equal Pay Act claims. So where do employers stand?

Where Does Potential Defense Come From?
The Equal Pay Act (EPA) provides four possible defenses to a pay equity claim, including a catchall provision that has led to much debate:

No employer…shall discriminate…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 jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (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***.

Because salary history is, technically, a factor "other than sex," some employers have argued that they should be permitted to use it to justify an unintentional gender-based disparity.

Employee Paid Less Than Others Solely Because Of Salary History
In February 2019, the Supreme Court struck down on technical grounds the 9th Circuit's attempt to sort out this issue. The *Yovino v. Rizo* case involved a Fresno County math consultant whose opening salary was set by a formula dictated by wage history, not taking into account prior experience or any other factors. She filed an EPA claim after learning that male colleagues subsequently hired in similar roles had been placed into higher salary steps—assumedly because their salaries at previous employers had been higher than her previous salary. The 9th Circuit became the first federal appeals court to explicitly reject the employer's contention that salary history could serve as a legitimate justification for a pay disparity under the EPA, but the Supreme Court was forced to throw out the ruling because of the untimely death of one of the appellate judges prior to the decision's publication.

The 9th Circuit took another crack at the case in February 2020, and once again concluded (this time with a full complement of *living* judges) that salary history cannot justify a pay disparity under the EPA. The court once again reiterated that only job-related criteria fall under the EPA's catchall defense. The court noted that the kinds of circumstances it would permit to be considered include shift differentials, the time of day when work is performed, and other similar legitimate distinctions. But prior pay isn't job-related for purposes of an EPA claim because it pertains to the salary the employee was paid at a different job, the court said, meaning it could not be used to justify paying a worker of one sex less than workers of the opposite sex for equal work.

"The express purpose of the EPA was to eradicate the practice of paying women less simply because they are women," the court concluded. "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." The employer took one final step in the hopes of salvaging the defense – it requested a review by the U.S. Supreme Court.

Where Does Supreme Court's Ruling Leave Employers?

In an unceremonious July 2 order, the Supreme Court passed on the employer's request, rejecting the chance to weigh in on the merits of this issue. The Court's action leaves some unanswered questions, but also provides a measure of certainty for some employers when it comes to EPA claims.

- Employers in the jurisdiction of the 9th Circuit Court of Appeals (California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho, and Montana) are clearly unable to use the salary history defense in EPA claims.
- Those employers in the 2nd Circuit (New York, Connecticut, and Vermont), 6th Circuit (Ohio, Kentucky, Tennessee, and Michigan), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), and 11th Circuit (Florida, Georgia, and Alabama) remain operating under the presumption that the EPA's "factor-other-than-sex" exception excludes salary history. However, each of the cases from these courts carried with them subtle nuances that may lead to differing conclusions on a case-by-case basis, and none provided such a definitive and clear-cut ruling as the 9th Circuit.
- At least two circuits have shied away from issuing such a broad pronouncement—the 7th Circuit (which oversees federal courts in Illinois, Indiana, and Wisconsin) and 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) – which means the defense may be a viable option in EPA claims.
- For employers in all other areas, open questions remain about the contours of the EPA catchall defense and the relation of salary history.
- Of course, employers across the country also need to be mindful of state or local equal pay laws that may also offer additional rules and requirements when it comes to compensation (and other) questions.

To Ask Or Not To Ask: That Is The Question

In light of this patchwork of varying standards, employers across the country — and especially those with operations spanning several of the jurisdictions described above — must determine whether they should eliminate questions about salary history during the application process and during compensation finalization. While several states and local areas have passed laws barring employers from making such inquiries and using past salary history to establish compensation, what should employers in other states do?

At this point, setting compensation based in whole or in part on salary history is fraught with danger in many jurisdictions around the nation. If you haven't been taking things seriously yet, you need to consider the specter of a pay equity claim a definitive risk and take immediate steps to address potential trouble spots.

You should begin by working with your counsel to conduct a privileged pay audit to determine if you have compensation gaps. If any are identified, you should work with your counsel to ascertain whether any are justifiable—perhaps because of differences in experience, education, ability, job performance, seniority, quality of work, quantity, or another job-related factor. Even in those states that have enacted salary inquiry bans, liability from past inquiries may be lingering. In some states, undertaking such an internal audit and then acting to remedy the situation will create a safe harbor shielding you from pay equity claims or damages.

You might also consider eliminating questions relating to salary history from your interview protocol and job applications. Instead, many employers now request an applicant's salary expectations at this stage in the process as a way to help negotiate a fair salary. You will also need to inform third-party reference check businesses operating at your command, and your hiring managers conducting job interviews, about any changes in your practice.

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Pay Equity Practice Group.

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