

FEDERAL APPEALS COURT MAKES CLEAR THAT NEW YORK'S EQUAL PAY LAW IS STRICTER THAN FEDERAL LAW: WHAT EMPLOYERS NEED TO KNOW

Insights
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A federal appeals court recently made clear that judges must evaluate equal pay claims separately under federal law and New York's separate equal pay law because the scope of the NY law is broader and could capture more legal violations – a decision that could open employers up to more pay equity litigation. New York's Achieve Pay Equity Act (APEA) greatly expanded employee pay equity protection for employees since it came online in 2016, well beyond the federal Equal Pay Act (EPA) – for example, it covers all protected classifications under the state's Human Rights Law, as opposed to just gender. And the Second Circuit Court of Appeals' October 17 decision in *Eisenhauer v. Culinary Institute of America* reminded employers that NY law also has more limited exceptions for justifying a pay differential between individuals performing the same or substantially similar work. What do employers need to know about this decision?

Pay Equity Law is Broader in New York

The federal EPA requires that men and women working in the same establishment receive equal pay for equal work. However, it provides exceptions employers can use to justify a pay differential between men and women, including a pay disparity resulting from:

- a seniority system;
- a merit system;

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- a system which measures earnings by quantity or quality of production; and
- a differential based on any other factor than sex.

The “any factor other than sex” justification is often referred to as a catch-all defense, and has been historically relied upon by employers to justify many pay differentials brought to a court’s attention. To some, this has left the EPA without much teeth.

New York’s APEA provides more expansive equal pay protections for employees performing equal or substantially similar work in the same establishment, which includes all locations in a geographic region (no larger than a county). Over the last several years, the APEA has been amended to expand upon the EPA in two significant ways.

- First, the APEA goes beyond gender to cover pay differentials based upon any protected category recognized under the New York State Human Rights Law – including age, race, creed, color, national origin, disability, etc.
- Second, the APEA eliminated the EPA’s catch-all defense and instead permits a pay differential only if it was based on a *bona fide* factor other than sex (such as education, training, or experience). The *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. While the employer bears the burden of proof on this affirmative defense under both federal and state law, the burden is far greater under the APEA. Moreover, an employee can overcome the *bona fide* factor defense by showing that: (1) the employer’s practice caused a disparate impact on the basis of a protected category; (2) that alternative practices exist that would serve the same business purpose and not cause a disparate impact; and (3) the employer has refused to adopt the alternative practice.

Professor’s Pay Equity Claim Originally Fell Short at Trial Court

Anita Eisenhauer, a female professor at the Culinary Institute of America (CIA), filed a lawsuit alleging that she was compensated less than a male professor at the school in

violation of both the EPA and APEA. The CIA defended its pay practices, asserting that any pay differential was lawful as it was based on a factor other than sex: a sex-neutral compensation plan that incorporated a pay scale set forth in a collective bargaining agreement.

The parties did not dispute that: (1) the pay disparity resulted from disparate starting salaries and the formulaic application of the compensation plan; (2) the compensation plan was applied uniformly to male and female faculty members; or (3) that the compensation plan's terms were sex neutral. However, the issue for the Second Circuit was whether the "factor other than sex" must be job-related.

The lower court dismissed Eisenhower's equal pay claims under both the EPA and APEA, agreeing with the CIA that the pay disparity was based on a factor other than sex and that the same standard should be used to judge both claims. Eisenhower appealed the decision to the Second Circuit, essentially arguing that the factor other than sex must be job related and that the court applied the wrong standard to her claims under the APEA.

Appeals Court Resurrects Claim and Ensures Expanded NY Law

But the Second Circuit Court of Appeals held that equal pay claims under the EPA and the APEA must be evaluated under the different standards set forth in each law. It therefore reversed the Southern District of New York's decision and held that the lower court erred by applying the EPA's catchall to evaluate Eisenhower's APEA claims.

It first affirmed the dismissal of the federal EPA claims, finding that the CIA acted lawfully when paying Eisenhower and her male colleague differently based upon the formulaic application of the compensation plan. In doing so, the court made clear that the CIA met its burden of showing that the pay disparity was based on any factor other than sex, and that the factor does not have to be job-related. The court recognized that the fixed-dollar pay increases in the compensation plan recognized the skill, experience, or added value associated with additional degrees or academic promotions and were sex-neutral.

However, the appeals court reversed course and resurrected Eisenhower's state APEA claim. It held that the lower court incorrectly evaluated whether the CIA established an

affirmative defense under the APEA using the same standard as the EPA because the laws are different. Instead, the appeals court said, the lower court should have examined whether the CIA met its burden of proving that the differential was based upon a *bona fide* factor other than sex – which, unlike under the EPA, would need to be job-related.

Because the lower court used the incorrect standard, the appeals court remanded the case back to the Southern District lower court to decide whether to it should handle a state law claim on its own (because the EPA claim was dismissed and no federal claims remained for a federal court to examine). If the lower court agrees to handle the case, it will examine whether: (1) Eisenhower established a *prima facie* case under the APEA; and (2) whether the CIA showed there is no genuine factual dispute that its compensation plan is job related. If the lower court decides that a federal trial court is not the right place for a state law claim to be decided, you can expect the case to end up being adjudicated in a New York state court.

What Should You Do Now?

The *Eisenhauer* decision highlights the complexity of the pay equity laws and the challenges employers face in complying with them. For New York employers in particular, it's important to review your compensation practices and recognize even a more structured salary guide or ladder system can be subject to scrutiny.

When it comes to setting compensation – whether initial pay or raises – New York employers must be vigilant and ensure that pay disparities among employees performing the same or substantially similar work can be justified by one of the limited criteria articulated under state law (which is more limiting than the federal law).

For assistance navigating the equal pay laws and evaluating compensation decisions, contact any member of our [Pay Equity Practice Group](#), the authors of this article, or your Fisher Phillips attorney. Make sure you subscribe to [Fisher Phillips' Insight System](#) to obtain the most up-to-date information directly in your inbox.