Conditional Class Certification in Equal Pay Cases Raises the Stakes for Employers

Insights
10.17.17

Employers got a good reminder this week in a case decided by an Illinois federal court about how easily complaints of unequal pay by a single employee can spiral into a conditional class action, upping the stakes and increasing the costs of litigation.

The Equal Pay Act (EPA) permits collective actions brought on behalf of named plaintiffs and others "similarly situated" against employers for alleged violations of the EPA. However, the statute is silent on how courts determine whether potential class members are "similarly situated." A majority of courts, including the 5th, 10th and 11th Circuits, and most recently a federal court in Illinois, have adopted a two-step approach that makes conditional certification of a class under the EPA relatively easy.

In *Ahad v. Board of Trustees of Southern Illinois University*, a female physician brought claims under the Equal Pay Act (EPA) alleging that the state medical school violated the EPA by systematically paying her and other female physicians less than their male counterparts who had similar experience, responsibility, and seniority. The court granted her motion to certify a conditional class of all current and former female physicians who were employed by the school during the prior three years based upon the plaintiff's "modest factual showing" that she and the members of the conditional class were victims of a common policy or plan that violated the EPA. As a result, all female physicians in the conditional class will receive notice of the action and given an opportunity to "opt-in" and join in the lawsuit.

In its decision, the court expressly noted that the plaintiff did not, at the conditional class certification stage, have to prove she and the other prospective plaintiffs were similarly situated. Rather, the court found that proving they are similarly situated was not necessary until after the close of discovery and the "opt-in" period (i.e. step two). Emphasizing that the standard for conditional certification is "fairly lenient," the Court also made clear in its opinion that the first step of the conditional certification analysis does not involve "adjudicating the merits of the claims, nor the kind of rigorous analysis typical of class certification," The implications for employers of such a lenient standard are troubling because the number of plaintiffs in a lawsuit under the EPA could greatly expand following notice and with that expansion, the potential exposure and litigation cost can grow exponentially.

A good example of how quickly potential plaintiffs and exposure can escalate after conditional certification is the *Barrett v. Forest Laboratories, Inc.*, 12-cv-05224 (S.D.N.Y.) case. After the court conditionally certified the class in September 2015, notice was sent out to over 2,000 putative class members, resulting in over 350 opting in to join the lawsuit. That case was recently settled for $4 million.

The best defense to these types of pay equity lawsuits is a good offense. Conducting an internal, privileged pay audit and remedying any unlawful disparities before being sued will not only help reduce the risk of expensive litigation, it could provide you with a safe harbor against liability if you do get sued under Massachusetts' and Oregon's new pay equity laws. Visit Pay Equity for a list of attorneys who are members of the Fisher Phillips Pay Equity Group.

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