



7-Year Equal Pay Class and Collective Action in NJ Could Settle for \$6.2 Million

Insights

1.10.19

More than seven years ago, female sales representatives who worked for Merck filed a class and collective action alleging discrimination in pay on the basis of their gender in violation of the Equal Pay Act (EPA) and Title VII. After years of litigation that resulted in a class and collective of 672 opt-in plaintiffs, the parties in *Smith, et al. v. Merck & Co., Inc.*, recently reached a settlement of \$6.2 million. We now wait to see if the court will approve the settlement. What do employers need to know about this proposed resolution?

Plaintiffs' Equal Pay Claims

Plaintiff Kelli Smith filed a class action complaint against Merck in New Jersey's federal court in May 2013 alleging gender discrimination. The complaint was thereafter amended to include a total of four named plaintiffs—all female sales representatives—and allege class and collective claims under the EPA, Title VII, the Family and Medical Leave Act (FMLA), and the Employee Retirement Income and Security Act (ERISA).

The complaint alleged that Merck systematically paid its female sales representatives less than similarly situated male sales representatives who performed the same job duties and worked under the same conditions. To support these claims, the complaint alleged that female sales representatives were routinely assigned to lower tiers than male sales representatives—resulting in a lower salary range—and pointed to flaws in the compensation and evaluation decision making processes which negatively impacted compensation and promotional opportunities for women.

The complaint further alleged that Merck fostered a “boys’ club” environment where women were excluded from promotional opportunities, denied access to leadership positions, and were particularly vulnerable if they became pregnant or take maternity leave.

In April 2016, the court conditionally certified a collective action regarding the EPA claims. As a result, notice of the collective action was mailed, and ultimately 672 female sales representatives opted in to the lawsuit.

Prior to reaching a settlement, the parties engaged in discovery that consisted of an exchange of documents, interrogatories, and almost 100 depositions. These depositions included 17 Merck fact witnesses, eight Rule 30(b)(6) deponents (corporate representatives), the four named plaintiffs, 66 opt-in plaintiffs, and four expert witnesses.

Settlement Details

Under New Jersey law, all settlements under the Fair Labor Standards Act (FLSA)—which includes the EPA as an amendment to the FLSA—must be approved by the court. On December 19, 2018, the parties filed a motion for preliminary approval of the settlement, which defines the class as including all female employees who are or were employed by Merck and its affiliates and worked in assorted sales representative capacities for at least one day between December 8, 2010 and October 1, 2018.

According to the documents filed with the New Jersey court, the \$6.2 million total settlement amount is comprised of the following:

- Class Member Awards determined pursuant to an allocation formula based on the total number of weeks worked during the liability period;
- Service awards of \$25,000 to each of the four class representatives;
- Service awards of \$4,000 for each of the 66 collective action members who were deposed;
- Service awards of \$1,000 for each of the 55 collective action members who submitted written discovery but were not deposed, and for the one collective action member who submitted a declaration but was not deposed;
- Service awards of \$100 for each of the 550 opt-in collective action members who did not participate in discovery;
- Attorneys' fees and reasonable litigation expenses not to exceed \$3 million; and
- Settlement administration fees not to exceed \$50,000.

If the court approves the settlement, notice will be issued to the entire class/collective of current and former female sales representatives. All sales representatives who do not opt out of the settlement will receive a class member award and a service award, if applicable, following the final approval of the settlement.

Conclusion

The *Smith* lawsuit was at the forefront of the recent wave of EPA litigation that we have seen across the country. Since this 2013 filing, lawsuits alleging claims of discrimination based on similar fact patterns have become commonplace. In fact, the plaintiffs' attorneys in this case (Sanford Heisler Sharp, LLP) have filed dozens of high profile EPA class and collective actions against large employers throughout the country, and routinely obtained multimillion dollar settlement awards for their clients.

Your organization might even be more at risk of a pay equity dispute in New Jersey now—or at least a costlier one—than was Merck in the above-described case. That's because Smith's lawsuit was filed before New Jersey enacted the Diane B. Allen Equal Pay Act (effective July 1, 2018), which provides more extensive remedies than the EPA and Title VII. Now that a heightened standard and

greater potential damages are in play, you have every incentive to ensure full and complete pay equity compliance.

If you have any questions about how to ensure your pay practices are in compliance with the EPA and the current version of state law, and how to defend against similar types of lawsuits, contact the [author of this post](#) or any member of Fisher Phillips' [Pay Equity Practice Group](#).

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