

## Federal Law Alert

April 11th, 2018

### **9th Circuit Rules Salary History Not an Acceptable Reason for Pay Discrepancies**

The 9th Circuit Court of Appeals ruled Monday that salary history is not an acceptable reason for pay differences under the Equal Pay Act (EPA), even when used in conjunction with other factors. The EPA first became law in 1963 and prohibits the payment of different wages to men and women who do work that requires equal skill, effort, and responsibility under similar working conditions.

The new reading of the law impacts employers in Alaska, Washington, Montana, Idaho, Oregon, California, Nevada, and Arizona, but since Circuit Courts often rely on one another's rulings, it's very possible that the impact of this decision will spread.

As written, the EPA allows for pay discrepancies for the following reasons:

- A seniority system;
- A merit system;
- A system that measures earnings by quantity or quality of production; or
- Any factor other than sex.

Employers, including the defendant in this case, have often used salary history to help determine a new employee's starting salary, and assumed that this would count as "any factor other than sex." The court did not claim that this is an unreasonable reading of the law. Rather, it said that such a reading is contrary to the point of the law, as an employee's past salary is likely to be impacted by gender-based pay discrimination.

### **Saving Money is Not Part of the Catch-All Provision**

The Court also established that "any factor other than sex" is limited to legitimate, job-related factors, such as experience, education, and ability. The catch-all provision does not include business-related reasons, such as an individual's willingness to work for lower wages or the need to offer higher wages to candidates in a more employee-friendly market. Essentially, the opportunity for cost-savings is not an acceptable reason for a pay differential.

The Court, however, deliberately stopped short of saying whether individualized salary

negotiations—which may involve some reliance on past salary—would provide a defense, but suggested a future court could rule on that issue.

### **Action Items**

#### *Audit Your Pay Scales*

Between the spread of equal pay legislation at the state level, the narrowing of the catch-all in the EPA, and the increased visibility of the women's equality movement, there is no better time to take a long hard look at how your employees are paid.

If you are in the 9th Circuit and among the many employers who have based employee wages to some extent on salary history, that practice should be stopped immediately, and different wages adjusted or accounted for. Also look for factors that contributed to pay differentials that were business-related rather than job-related.

Be aware that you cannot reduce someone's pay as a remedy under the EPA.

#### *Stop Asking About Salary History*

We have advised against asking candidates about their salary history for some time, but the advice becomes more urgent now. Although it is still legal to ask this question in most states, having this information is very likely to impact the offer made to a new employee. Even if the answer has no impact on the offer, the mere asking of the question implies that the employer intended to do something with the information, thereby opening the door for a discrimination claim. California, Oregon, Delaware, and Massachusetts (as of July 1) have already banned salary history inquiries.