

Guest view: In face of gender pay gap, revisit questions about salary history

By Renee C. Mattei Myers, November 17, 2017 at 3:00 AM - Last modified: November 17, 2017 at 7:49 AM



Renee C. Mattei Myers, member of law firm Eckert Seamans Cherin & Mellott LLC - (Photo / Submitted photo)

For 54 years, the federal Equal Pay Act has prohibited employers from discrimination in pay based on sex.

However, statistics continue to show that women receive approximately 80 cents for every dollar earned by men (see, e.g., “The Simple Truth about the Gender Pay Gap, American Association of University Women”). Why? And what is to be done?

Under the act, an employer must pay a woman the same wages as a man for the same work, unless the disparity is due to: 1) a seniority system; 2) a merit-based system; 3) a system based on quality or quantity of production; or 4) a difference based on a factor “other than sex.” Are these exceptions so broad that they swallow the rule entirely?

Because of the perceived lack of protection under the current law, state and local legislatures are taking a harder look at pay disparities and attempting to find ways to close the gap. The current focus appears to be on barring employers from requesting salary history during the hiring process.

What's the reasoning behind these new prohibitions? If you assume a woman is currently earning less than her male counterpart, an employer that utilizes salary history will allegedly perpetuate this disparity. Employers may reason — “I can't give [female applicant] a 20 percent increase in salary even though it matches the departed

male incumbent because it would be unfair to other employees.” As a result, the qualified female applicant is paid less, perhaps, than her market worth because of an inherent systemic issue she can never overcome.

Recently, the U.S. Court of Appeals for the 9th Circuit faced the question of whether a system that based an employee’s starting wage on prior salary history could be a “factor other than sex.” In *Rizo v. Yovino et.al.* (April 2017), employees were placed in an established salary range based upon education and experience. However, once within a range, starting salary was determined according to the employee’s salary history, resulting in a female employee with the same educational background and experience being assigned a starting salary less than her male coworker’s simply because she earned less at her former position.

The plaintiff and the EEOC argued that this use of prior salary can never comply with the Equal Pay Act as a “factor other than sex” because, in doing so, an employer perpetuates existing pay disparities which undermine the purpose of the act.

The lower court agreed, concluding that when an employer bases its pay structure exclusively on salary history, a resulting pay difference is not defensible under the Act. The 9th Circuit Court of Appeals reversed, finding that in limited circumstances, if the use of salary history “effectuates some business policy” and the employer used prior salary “reasonably in light of its stated purpose and other policies,” it could comply with the Act. The court, however, decided to give the matter a closer look by granting en banc review.

The outcome of this case may affect the hiring process. Employers rely on salary histories for a variety of reasons: some to screen out applicants whose salary expectations may be out of line with what is budgeted for the position; others, as part of the negotiation process in order to get a desired candidate at a lower cost.

Several states have already enacted legislation banning employers from seeking or relying on salary histories during the hiring process. Many others, including Pennsylvania, have legislation pending.

These statutes contain similar components mandating that, during the hiring process, employers are prohibited from asking questions designed to elicit salary history. Employers are also prohibited from discriminating or retaliating against an individual who refuses to provide such information. Violators face potential civil penalties and/or the risk of private discrimination lawsuits.

It is important to remember that employers generally are permitted to ask applicants desired salary range or expectations. Employers can also request information on things like job performance history and production/sales numbers.

It remains to be seen if salary-history bans have their intended effect of closing the wage gap.

In the meantime, the following are a few practical tips:

1. Focus interview questions on prior job performance, duties and work-related experience — not wages.
2. Set the rate of pay based on objective criteria and the value of position you are hiring for — not the person that ultimately fills the position.
3. Train your HR staff on what types of questions are and are not permitted.
4. Utilize the salary negotiation process as a way to garner trust and respect with employees.

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