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Pay Equity Litigation

April 11, 2018

On Monday, a federal appellate court issued a decision, which will gain significant publicity and will likely impact us in the banking industry. The Ninth Circuit Court of Appeals addressed the viability of a common defense to compensation discrimination claims advanced under the federal Equal Pay Act.

The Equal Pay Act requires that men and women be paid similar compensation when they perform the same work responsibilities. Equal work is generally defined as tasks which require “equal skill, effort and responsibility, and which are performed under similar working conditions”. The federal law does recognize exceptions to this equal pay standard. The four exceptions are compensation differentials based upon “a seniority system, a merit system, a system which merits measures earnings by quantity or quality of production, or a differential based upon any other factor other than sex”.

In the *Rizzo* case, the full Ninth Circuit Court of Appeals specifically addressed a recurring issue. The Court considered whether an individual’s prior salary qualifies as “any other factor other than sex”. The Court specifically addressed whether employers making compensation decisions based upon prior salaries would “allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum”. As stated in the Opinion:

“The question before us is simple. Can an employer justify a wage differential between male and female employees by relying on prior salary? Based on the text, history and purpose of the Equal Pay Act, the answer is clear: No.”

The California School District, which was the employer in this case, admitted that employee pay was dictated by prior salary, and therefore this legal conclusion was determinative. The Court summarized its view as follows:

“If money talks, the message to women is more than ‘just’ billions: women are told they are not worth as much as men. Allowing prior salary to justify a wage differential perpetuates this message entrenching in salary systems an obvious means of discrimination--the very discrimination the Act was designed to prohibit and rectify”.

This federal appellate court decision does arise from the Ninth Circuit, which is a liberal jurisdiction. The decision is not necessarily binding in other parts of the country, but the Court does note similar conclusions by other federal courts of appeals.

The banking industry has been sensitive to pay equity expectations and quite proactive over the years in ensuring that employees are paid based on contribution, and not gender or race. With that said, this decision encourages thoughtful compensation management.

In addition to these federal court interpretations of the Equal Pay Act, we have certainly seen developments at the state and local level too. Laws, regulations, and ordinances have been introduced which prohibit, among other things, employers requesting prior salary information from applicants for employment. As those state and local standards proliferate, we again focus on whether prior salary perpetuates historical compensation discrimination.

These developments really encourage the banking industry to continue its efforts. We should maintain compensation structures, where we establish parameters for appropriate compensation which line-up with different roles in our organizations. Those compensation structures should have some linkage to legitimate business and local market considerations. We also need to ensure that when we bring on new employees, we establish starting rates that are truly justified by the responsibilities and the individual's job related competencies and qualifications. We of course need to evaluate compensation periodically, probably at least once each year, to continue to refine relative employee compensation across the organizations. At the end of the day, structure is necessary to avoid falling into a situation where we find our compensation rates not calibrated with nondiscriminatory criterion and confront very difficult remedial decisions.

We are pleased with the regulatory relief we have seen over the past 16 months from the Trump Administration. In the banking industry, pay equity is in our view the top compliance priority and a top area of potential exposure.

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