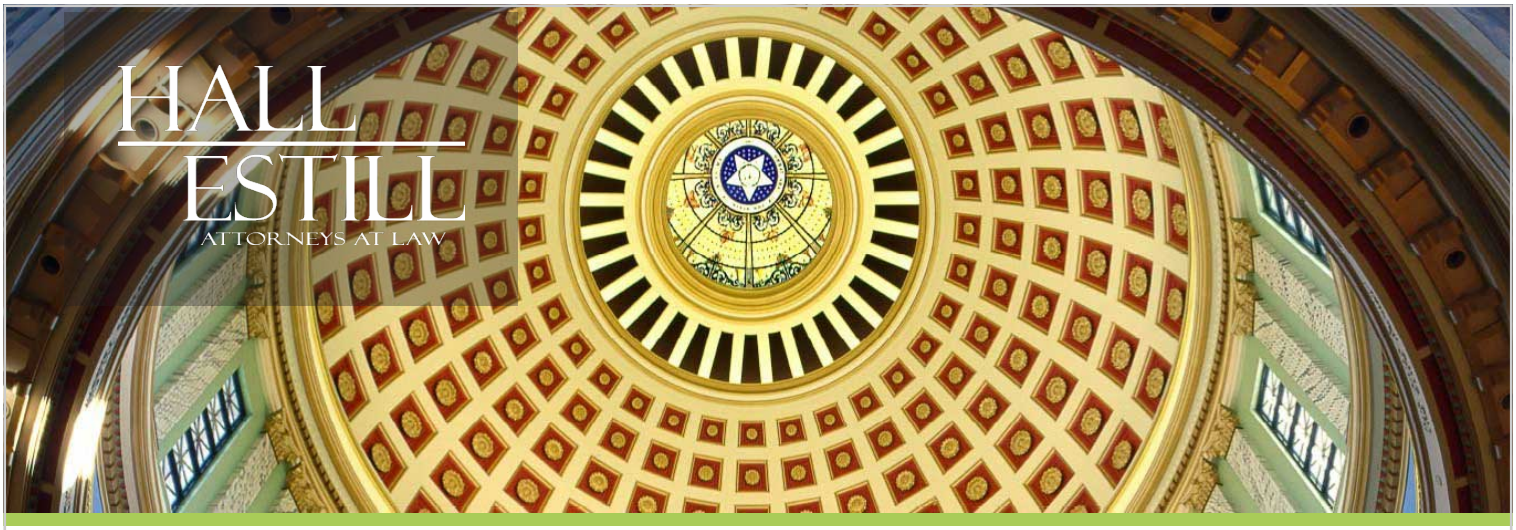

Employment Alert! Change of Potentially Epic Proportions In The Application Of The Equal Pay Act

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For many years, Employers have used as an affirmative defense to a female making less than males in a job that the reason was a factor other than sex. The reason, they have argued, is that the wage is based upon the employee's prior pay history, not on their gender. Recently a Federal Appeals Court rejected that "affirmative defense," and several jurisdictions have begun to reject the entire notion that employers can seek information about prior pay of applicants.

On April 9, 2018, in *Rizo v. Yovino*, 2018 WL 1702982, the Ninth Circuit Court of Appeals addressed what it referred to as a "simple" question: "can an employer justify a wage differential between male and female employees by relying on prior salary?" *Id.* at *1. The Ninth Circuit, held that "the answer is clear: No." *Id.* At least in the Ninth Circuit—which covers eight states, including Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington — Employers may no longer use a woman's salary history to rationalize paying her less than a man in the same position. More specifically, the panel of judges said that calculating a woman's pay based on her salary history is a form of gender discrimination in violation of the Equal Pay Act of 1963, which prohibits businesses from paying women less than men for the same work.

The Equal Pay Act of 1963

Under the Equal Pay Act of 1963 (the "EPA"), employers must provide equal pay to employees engaged in substantially equivalent work, regardless of sex. *See* 29 U.S.C. § 296(d)(1). The EPA contains four statutory exceptions, three specific and one general catchall provision: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of

production; or (iv) a differential based on any other factor other than sex." Id.

To prove a violation of the EPA, "[a] plaintiff must show that her employer has paid male and female employees different wages for substantially equal work," and that none of the above exceptions apply. *Rizo* 2018 WL, at *4. **Significantly, such a showing does not require that the plaintiff prove her employer acted with discriminatory intent.**

In *Rizo*, the Court considered the fourth "catchall" exception to the EPA—any factor other than sex—and whether setting a female employee's starting salary on the basis of her prior salary constituted a "factor other than sex." The Court was emphatic in its answer in the negative.

The hiring practice/pay structure at issue in *Rizo* involved "taking the hired individual's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule." *Id.* at *2. The employer argued that its system considering prior pay amounted to consideration of a "factor other than sex." The Court disagreed, concluding "unhesitatingly, that 'any factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." Therefore a factor other than sex must be one that is related to the performance of a specific job or position in which an employee is or will be engaged.

The Court also made clear that salary history may not be considered even if it is **merely one of multiple considerations in determining a female employee's staring pay.** "Prior salary, whether considered alone or with other factors, is not job-related and thus does not fall within an exception to the Act that allows employers to pay disparate wages."

This decision means entities doing business in any of the affected states must conform their hiring practices and pay structures to exclude any reference to prior pay. In fact, employers in those states should not even ask for prior wage information.

But even if you operate outside of those states, several other states and municipalities enacted similar bans on a woman's salary history influencing her starting pay upon new employment. For example, Delaware, Massachusetts, New York City, Philadelphia and Puerto Rico have outlawed employers from inquiring about a job candidate's salary history. New Orleans and Pittsburg have put in place similar bans for hiring municipal applicants. Maryland is currently formulating its own embargo on the practice. Although some states and municipalities are pushing back—Illinois Governor Bruce Rauner vetoed a proposal to ban the prior salary question—the Ninth Circuit's ruling and the actions in the jurisdictions mentioned, means a shift taking place across the country.

Employers operating in these jurisdictions—and those that wish to comply with the spirit of the EPA before they're compelled to do so—should not consider a woman's prior pay in determining her starting pay. The only factors which may contribute to an employer's decision to pay a woman less than a man for substantially equal work are (1) seniority, (2) merit, (3) productivity, and (4) any factor other than sex. A factor other than sex is limited to a factor that is job-related. Job-related factors include "a prospective employee's experience, educational background, ability, or prior job performance." Intent is not required in proving a violation of the Act. Therefore employers must remain particularly vigilant to avoid consideration of prior pay, or the appearance thereof, when determining a new female employee's starting pay.

A well-defined pay structure irrespective of sex is clearly advisable. Wherever a male employee receives higher pay than a female employee for substantially equivalent work, such higher pay must be the result of a job-related factor such as experience, educational background, or prior job performance. The most advisable course of action is to altogether eliminate disparate pay for any

employees engaged in substantially equivalent work. In interviewing job applicants, eliminate any line of questioning regarding an applicant's salary history is advisable. The trend—even though the first Appellate decision is from an admittedly pro-employee circuit—seems likely to find such questions as some evidence of a violation of the EPA.

If you want to learn more, or have questions about what your organization should do in response to these updates, please contact your **Hall Estill attorney**

Practices

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