

Equal Pay: Where Do We Stand Now?

By **Debra Ellwood Meppen** and **Laurie DeYoung** April 24, 2018, 11:45 AM EDT

Women have been fighting for equal pay for nearly a half century. In September 2017, three former female employees sued [Google Inc.](#) seeking class certification for Google's alleged violation of California's Equal Pay Act, codified in California Labor Code Section 1197.5. The California Equal Pay Act requires equal pay for employees who perform "substantially similar work" when viewed as a composite of skill, effort and responsibility. The 2016 amendment to the act strictly prohibits employers from relying on the employee's prior salary to justify a sex-based difference in salary. In fact, in 2018 California outlawed employers from asking about job applicants' former salaries under any circumstances. The plaintiffs in *Kelly Ellis v. Google* accuse Google of intentional and systematic violation of the Equal Pay Act because of a company-wide policy of assigning female employees to jobs within Google based on stereotypes, and then handing women a lower starting salary than men upon their hire.

After Google's successful demurrer to the original complaint, the plaintiffs amended the lawsuit to add an additional plaintiff. The first amended complaint charges Google with intentionally paying females less than their male counterparts in 30 job positions from six job categories. The plaintiffs focus on Google employees' initial salaries because they contend that the pay gap at Google can be traced all the way back to the time of hire. The plaintiffs allege that Google routinely relied upon an applicant's prior salary when setting the initial Google salary. The plaintiffs assert that such reliance perpetuates a pay gap because women in the United States earn between 79 and 92 cents for every dollar earned by men. They also claim that Google regularly channeled female employees into lower-paying job positions. The plaintiffs contend that Google was well aware of the impact of its discriminatory and unequal pay policies because Google performs annual internal pay equity analyses which would have shown the substantial sex-based pay disparities within the company.

Google challenged the first amended complaint claiming inadequate class representation and the need for individualized proof on the intentional discrimination claim. San Francisco Superior Court Judge Mary Wiss overruled Google's demurrer in its entirety on March 26, 2018. The court found that the plaintiffs' allegations that (1) Google has a company-wide policy for setting initial salary based on consideration of the employee's former salary, and (2) Google's decision to place female employees in lower-paying job positions in part due to Google's stereotypes about women were sufficient to demonstrate that common issues of law and fact predominate over individualized questions. Similarly, the court found that the first amended complaint adequately pled a claim for intentional discrimination for the same reasons, plus the fact that despite Google's apparent knowledge of the pay gap the company continued to set compensation and make job placement decisions on the



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allegedly discriminatory policies and practices.

The immediate impact of the Google decision means that the parties will continue with class discovery. It is undisputed that the Google class ranges from 5,000 to 7,000 women at seven Google offices. The plaintiffs seek discovery on issues relating to how employees are assigned to a salary level and they want to depose the person most knowledgeable on issues relating to initial compensation. While the court is eyeballing an early 2019 hearing date for a class certification motion, it is more likely that the case will end up in mediation before the parties actually contemplate certification of this large and potentially monumental class of women.

If the Google class is certified and if the plaintiffs win, it may signify the beginning of the end of the fight for equal pay for women, but the effect of the decision will likely not end there. Earlier this month, the Ninth Circuit in *Rizo v. Yovino* held that prior salary, standing alone or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act. The Ninth Circuit characterized the persistent wage gap in our country as “an embarrassing reality of our economy.” The court acknowledged that in the absence of a ruling that delegitimized employers’ reliance upon females’ prior salary, employers could “capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum” and would be contrary to the text of the Equal Pay Act and “would vitiate the very purpose for which the act stands.” The Ninth Circuit decision was also based, in part, on the district court’s conclusion that “reliance upon a woman’s salary ‘necessarily and unavoidably conflicts with the EPA because ‘a pay structure based exclusively on prior wages is so inherently fraught with the risk — indeed here, the virtual certainty — that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand.’” [1] The Ninth Circuit left open numerous issues relating to legitimate nondiscriminatory salary negotiations for future consideration.

The trajectory of these state and federal cases may open the floodgates to further litigation focusing on equal pay. Plaintiffs may seek to expand the reach of these recent holdings to include an affirmative obligation on California employers to engage in a look-back and close existing pay gaps. A retroactive application of California’s equal pay laws could wreak havoc on big and small businesses alike if they are forced to shoulder the burden of eliminating a century’s worth of potential unequal pay in one fell swoop.

Not all pay gaps are illegal. Legitimate non-gender-based criteria may appropriately be considered by an employer when setting initial salary, promotion, raises or bonuses. While the law remains unsettled in California, employers can stay one step ahead of the law as long as they focus on gender-neutral reasons when setting employee compensation. A smart employer will seek to clearly define the legitimate bases upon which they make salary decisions. Employers may justify a pay differential in many ways. First, an employer may rely on quantity or quality of education or post-education certifications. Second, an employer may rely on experience in the field or related experience that could increase an employee’s overall value to the employer. Third, an employer may rely on an employee’s skills in supervising, training or mentoring employees which provides the added benefit of building the company’s future. Fourth, an employer may rely on an employee’s reputation in the community or industry when setting salary.

An employer that considers these criteria when determining employee compensation does

not run afoul of the state or federal equal pay laws. The law is developing at a furious pace. Stay tuned.

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