

## Burrows: Employee pay history – avoid the temptation

By: Meagen Burrows Guest Columnist March 8, 2019 0



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Setting employee salaries can be a challenging exercise.

Although an employer's goal is often to identify and offer the lowest possible salary that a qualified candidate will accept, an employer may be setting itself up for claim of wage discrimination in violation of the Equal Pay Act of 1963 (EPA) if pay history data is used, even in part, to establish a salary for an employee that is lower than that of comparable opposite sex employees doing the same work.

Unlike a Title VII discrimination claim, which places the initial burden of proof on the plaintiff, a claim of wage discrimination under the EPA "impos[es] a form of strict liability on employers who pay males more than females for performing the same work . . . ." *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006). If a plaintiff can establish that opposite sex employees are paid differently for substantially similar work, then the employer has the burden of proving that a permissible reason for the pay disparity exists that not only *could*, but also *does in fact*, explain the wage disparity. *Id.* at 1312 (citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107–108 (3d Cir. 2000)).

Further, even if pay history is *in fact* the reason for a wage differential between male and female employees, in a growing number of states and circuits, it may not be a *permissible* reason. See, *e.g.*, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), cert. granted, judgment vacated on technical grounds by *Yovino v. Rizo*, No. 18-272, 2019 WL 886486 (U.S. Feb. 25, 2019). In *Rizo*, an employee alleged that her employer violated the EPA by using her prior salary to determine the step on its salary schedule on which to place her (using the same system, male colleagues were placed on a higher salary step). The employer argued that pay history is a *differential other than sex* that is a permissible basis for a pay disparity under the EPA, but the court in *Rizo* disagreed:

Prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise – to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum* – would be contrary to the text and history of the (EPA), and would vitiate the very purpose for which the Act stands.

The *Rizo* court concluded that a "factor other than sex" explaining a pay disparity in compliance with the EPA must be "job-related" and that salary history is not sufficiently job-related. To minimize risk, employers should collaborate with counsel to audit for pay disparities and create a plan of remediation.

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