The Current State of Pay Equity Reform

BY KATIE BROWN

This article discusses the evolution of pay equity law, with a focus on the Colorado Equal Pay for Equal Work Act.

For nearly 60 years, two foundational pieces of federal legislation—the Equal Pay Act of 1963 (EPA) and the Civil Rights Act of 1964[1]—have served as benchmark prohibitions on pay discrimination in the United States. Notwithstanding decades of these substantive federal protections, the issue of pay equity reform rose to the political forefront in recent years, with efforts paved against a backdrop of federal statutes, US Supreme Court decisions, a patchwork of state pay equity laws, as well as private pressures from company shareholders, investors, and employees.

The impact of these renewed efforts manifested largely at the state level. Here, the Colorado legislature followed a number of other states in expanding pay equity protections when it passed the Colorado Equal Pay for Equal Work Act (CEPEWA),[2] which took effect on January 1, 2021. In many ways, the CEPEWA goes further than any prior state or federal legislation in its unprecedented requirements on employers.

This article discusses the evolution of pay equity reform in the United States, which has shifted in focus from broad prohibitions on pay discrimination to more nuanced issues that characterize all stages of the employment relationship, such as bans on inquiries into and/or reliance on salary history; promotion of the exchange of salary information in the workplace; and now, under the CEPEWA, advertisement of compensation and internal opportunities for employees and applicants.

Federal Legislative Milestones

The first major milestone in pay equity legislation occurred when Congress incorporated the EPA into the Fair Labor Standards Act[3] in 1963. The EPA prohibits employers from discriminating on the basis of sex by paying employees of one sex wages that are less than those paid to employees of the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[4] But the EPA allows employers to justify workplace wage disparities by proving the existence of one of four enumerated affirmative defenses: a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or a differential based on any other factor other than sex.[5] The following year, Congress passed Title VII of the Civil Rights Act of 1964 (Title VII), which made discrimination in compensation because of an individual's sex an "unlawful employment practice."[6]

In the early 2000s, the issue of pay equity reentered the national conversation when the 2005 Paycheck Fairness Act was introduced in Congress. Although this Act did not pass initially and has not passed despite reintroduction as recently as January 2021,[7] many of its provisions, such as requiring employers to demonstrate that pay differentials resulted from "education, training, or experience," and otherwise limiting employers' abilities to invoke the EPA's affirmative defenses, served as the groundwork for the Lilly Ledbetter Fair Pay Act of 2009 (Fair Pay Act)[8] and a subsequent wave of pay equity legislation at the state level.

The Fair Pay Act was the first bill signed into law by President Obama. This law directly overturned the US Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co*. by expanding the statute of limitations for bringing

a wage discrimination violation under Title VII.[9] In *Ledbetter*, the Court held in a 5–4 decision that the statute of limitations for an EPA claim begins to run when the first discriminatory event occurs, for example, when employees receive their first paycheck.

The Fair Pay Act was based largely on Justice Ginsburg's dissenting opinion, which noted that because salary data or information about wage differentials is rarely disseminated in the workplace, pay disparities can occur over time in small increments without an employee's knowledge, and this unknowingness should not preclude an employee from challenging an employer's pay practices.[10] Relying heavily on this reasoning, the Fair Pay Act provides that an "unlawful employment practice" occurs each time an employee becomes subject to or affected by such a practice, for example, each instance an employee receives a paycheck that is the subject of an alleged discriminatory compensation decision. At its core, the Fair Pay Act focuses on increased salary transparency in the workplace as a method to combat pay inequities.

The States Respond

In the decade following the Fair Pay Act, many states passed laws making it illegal for employers to prohibit salary discussions among employees, specifically aiming to promote open dialogues about wages and to address pay equity.[11] In Colorado, as of 2017, state law prevents employers from discharging, disciplining, or discriminating against an employee because the employee shared information about or discussed his or her wages.[12] Further, this absolute right to discuss pay cannot be waived.[13]

In conjunction with increased freedoms for employees to discuss salaries and wages, a host of jurisdictions, including Colorado, also have passed laws banning both inquiries into a prospective employee's salary history and reliance on that history in setting future compensation.[14] Salary inquiry and reliance bans vary from state to state, but all seek to enhance equity in salary negotiations and hiring. However, the utility and propriety of such bans is the subject of controversy among private sector interests and in the federal circuit courts.

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The Circuit Split

In 2019, the Ninth Circuit Court of Appeals in *Rizo v. Yovino* examined whether employers can justify pay differentials by pointing to prior salary histories,[15] which ultimately resulted in a split among the federal circuit courts interpreting the EPA. As noted above, the EPA provides an affirmative defense for a wage differential based on any factor other than sex. Yet the EPA does not define or limit this "catch-all factor," and employers historically have relied on an employee's salary history as a justification under the defense.

In *Rizo*, the Ninth Circuit held that "prior salary alone or in combination with other factors cannot justify a wage differential."[16] In other words, salary history is not a legitimate "factor other than sex" that can support a pay disparity. The Second, Sixth, Tenth, and Eleventh Circuits have adopted similar positions, but *Rizo*'s holding renders the Ninth Circuit the most restrictive in terms of limiting salary reliance.[17]

On the other end, the Seventh and Eighth Circuits allow reliance on salary history alone as "a factor other than sex," and thus, it is a proper affirmative defense in those circuits.[18] Further, the Federal Circuit makes it the plaintiff employee's burden to "establish that the pay differential between the similarly situated employees is 'historically or presently based on sex.'"[19]

The US Supreme Court declined its most recent opportunity to resolve this circuit split and establish a universal precedent. After granting certiorari to *Rizo*'s appeal, the Supreme Court vacated and remanded the decision because a deciding judge had passed away before the decision was published.[20]

The Prior Pay Issue

The unsettled question over whether salary history constitutes a valid affirmative defense among the federal circuits ostensibly explains recent momentum at the state level to pass laws directly eliminating the "catch-all" affirmative defense. In passing the CEPEWA, Colorado joined New York, Oregon, California, and Massachusetts, which all at some level prohibit or limit when an employer may rely on prior pay as a "factor other than sex" in setting future salaries.[21] The CEPEWA requires employers to show that any and all pay differentials are the product of

- a seniority system, merit system, or system that measures earnings by quantity or quality of production, as under the federal EPA;
- the geographic location where the work is performed;
- education, training, or experience; or
- travel requirements.

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Notably, in seeking to advance the underlying goal of increased transparency, the CEPEWA imposes obligations on employers that no state law has ever before required. Specifically, the CEPEWA requires employers to disclose compensation information in every external job posting and to advise current employees of job openings, including the salary information associated with such job openings, that might qualify as promotional opportunities. The compensation disclosure requirement for external postings is especially unique in that it applies not just to postings for Colorado jobs, but also to any posting for a remote position that could be performed in Colorado. In the COVID-19 era, where remote work is now the norm for many companies, this provision has vastly extended the reach of the CEPEWA, and as a result subjected the law to legal challenges from out-of-state or multijurisdictional employers seeking to avoid the new disclosure requirements.[22]

Conclusion

The CEPEWA reflects the nation's shifting focus from broad prohibitions on pay discrimination to more nuanced thinking about heightened salary transparency at different stages of employment. Although legal challenges to the CEPEWA remain pending and its long-term effects are unknown, the CEPEWA's market impact suggests that it is already poised to be a historic piece of pay equity legislation. CL

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NOTES

1. 29 USC § 206(d); 42 USC §§ 2000e et seq.
2. CRS §§ 8-5-101 et seq.
3. 29 USC § 206(d).
4. 29 USC § 206(d)(1).
5. *Id.*
6. 42 USC § 2000e-2(a)(1) (rendering it unlawful for an employer "to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex . . . .").
7. Paycheck Fairness Act, H.R. 7, 117th Cong. (2021) (passed by the House on April 15, 2021, but not advanced by the Senate on June 8, 2021).
8. Lily Ledbetter Fair Pay Act of 2009, 42 USC § 2000a.
9. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618–19, 627 (2007).
10. *Id.* at 645 (Ginsburg, J., dissenting).
11. *See* Conn. Gen. Stat. § 31-40z(b); Or. Rev. Stat. § 652.355(1); N.H. Rev. Stat. § 275:41-b; Rev. Code Wash. § 49.58.040(2); and Md. Code Lab. & Empl. § 3-304.1.
12. CRS § 24-34-402(1)(i).
13. *Id.*
14. Equal Pay for Equal Work Act, CRS § 8-5-102(2)(a). *See also* Cal. Lab. Code § 432.3(b); Conn. Gen. Stat. § 31-40z(b)(5); Del. Code. § 709B(b); Haw. Rev. Stat. § 378-2.4(a); 820 Ill. Comp. Stat. § 112/10(b-5), (b-10), (b-20), (c)(4); Me. Rev. Stat. § 4577; Md. Code Lab. & Empl. §§ 3-304.2(B) and 3-308; Mass. Gen. Law ch. 149 § 105A(c)(2), (3); N.J. Stat. § 34:6B-20; N.Y. Lab. Law § 194-a(1); Or. Rev. Stat. §§ 659A.357, 652.220(1)(c), (d); R.I. Gen. Laws §§ 28-6-18(g) and 28-6-22(a), (e); 21 V.S.A. § 495m(a); and Rev. Code Wash 49.58.100(1).
15. *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018), *vacated*, 139 S.Ct. 706 (2019).
16. *Id.*
17. *See, e.g.*, Meneghello et al., "Appeals Court Says Salary History Can't Block Equal Pay Act Claims," Fisher Phillips (Apr. 9, 2018), https://www.fisherphillips.com/resources-alerts-appeals-court-says-salary-history-cant-block (noting that while other circuits have limited the "EPA's catchall provision to job-related factors," the Ninth Circuit has provided the most "definitive and clear-cut ruling").
18. *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) ("[T]his court has repeatedly held that a difference in pay based on the difference in what employees were previously paid is a legitimate 'factor other than sex.'" (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005)).
19. *See Gordon v. United States*, 903 F.3d 1248, 1254 (Fed.Cir. 2018) (citing *Yant v. United States*, 588 F.3d 1369, 1372 (Fed.Cir. 2009)), *vacated*, 754 F. App'x 1007 (Fed.Cir. 2019).
20. The Ninth Circuit, sitting en banc, has since affirmed the district court. *See Rizo v. Yovino*, 950 F.3d 1217, 1221–22 (9th Cir. 2020).
21. Mass. Gen. Laws ch. 149, § 105A(b)(i)-(iii), (v); N.Y. Lab. Law § 194(1)(d); Or. Rev. Stat. § 652.220(1)(d).
22. *Rocky Mountain Ass'n of Recruiters v. Moss*, 541 F.Supp.3d 1247 (D.Colo. 2021); Israel, "'It Applies To Us?'"—U.S. Employers Surprised by Expansive Job-Posting Requirements in Colorado's New Equal Pay Law" (July 6, 2021), https://www.foley.com/en/insights/publications/2021/07/it-applies-to-us-colorado-new-equal-pay-law; Cutter, Many Companies Want Remote Workers—Except From Colorado (June 17, 2021), https://www.wsj.com/articles/many-companies-want-remote-workersexcept-from-colorado-11623937649#:~:text=At%20issue%20is%20a%20new,greater%20pay%20transparency%20for%20employees.