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So, When Can I Consider Salary History in Setting Compensation?

Alexandra Hemenway

The author explains that if an employer relies upon salary history in setting applicant or employee compensation, it faces an inherent risk of running afoul of a myriad of equal pay legislation.

For decades, it has been a "common personnel-management practice" that American employers use to set employee compensation: salary history.[1] However, since 2016, 25 state and local jurisdictions have enacted what are commonly referred to as "salary history bans."[2] These laws aim to shrink the gender pay gap by precluding employers from inquiring about an applicant's salary history during the interview process, and in some instances, from relying upon applicant salary history in making compensation decisions for that applicant. The pace at which many states across the country have enacted salary history legislation may cause American employers to rightfully question the viability of this longstanding "personnel-management practice."

The prohibition against asking job applicants what they made at their last job is relatively straightforward. Many salary history bans provide that questions regarding an applicant's salary "expectations" are permissible, and thus, employers are able to learn much of the relevant information regarding an applicant's compensation expectations by phrasing the question in this manner.[3] The more nuanced question is whether and when employers can consider salary history in determining compensation for job applicants or current employees.

A review of the salary history ban statutes, especially as they fit within the larger landscape of existing state equal pay legislation, and the federal

Alexandra Hemenway, an attorney in the San Francisco office of Littler Mendelson P.C., concentrates her practice on representing companies in employment, wage and hour, and equal pay matters. She may be contacted at *ahemenway@littler.com*.

appellate authority that has examined this topic within the context of the federal Equal Pay Act for decades, are necessary to fully grasp this question. In short, although federal and state legislative and judicial authority with respect to this issue remains in flux, the most prudent course for employers is to ensure that their compensation systems rely upon on job-related factors – factors which are not based on salary history. Stated differently, if an employer relies upon salary history in setting applicant or employee compensation, it faces an inherent risk of running afoul of a myriad of equal pay legislation.

SALARY HISTORY LEGISLATION: MISLEADING EXCEPTIONS FOR APPLICANT'S VOLUNTARY DISCLOSURE

Some of the existing salary history bans, including those in California and New York, expressly or impliedly provide that employers are permitted to consider, or even rely upon, an applicant's salary history in determining what compensation to offer that applicant, if the applicant voluntarily discloses their salary history.[4] Additionally, a majority of the salary history ban legislation provides that some portion of the statute's prohibitions are inapplicable if the applicant voluntarily discloses their salary history information.[5] Where defined, a "voluntary" disclosure is typically described as a freely offered statement from an applicant that was in no way prompted, solicited or encouraged by the employer or an agent of the employer.[6] The "voluntary disclosure" exception is applied differently depending on the jurisdiction in question.

For example, some jurisdictions, like Hawaii, Maine, Massachusetts, New Jersey, New York, Puerto Rico, Vermont, and Washington, allow an employer to "verify" or "confirm" an applicant's salary history information only if it was voluntarily disclosed.[7] Thus, within these jurisdictions, if an applicant represents to a prospective employer that they earn a certain salary in their current role, then the employer is allowed to verify that the representation made by the applicant is accurate.[8] These exceptions relate more directly to the salary history legislation's primary prohibition: to preclude employers from affirmatively asking job applicants about their salary history.

However, the materiality of a voluntary disclosure also arises within the context of the reliance question, that is, when an employer can rely on an applicant's voluntarily disclosed salary history information in making a compensation decision for that applicant. For example, in California, Hawaii, New Jersey, and New York, salary history legislation provides that an employer may "consider," "factor in" or "rely" upon an applicant's voluntarily disclosed salary history in making compensation decisions for that applicant.[9] Other statutes, such as the Illinois legislation, provide the opposite.[10] In Illinois, if an applicant voluntarily discloses their salary history, an employer is expressly

prohibited from relying upon the voluntarily disclosed information "as a factor" in determining what compensation to offer the applicant, whether to make an offer, or in determining future salary, benefits or other forms of compensation for that applicant.[11] Oregon similarly provides that employers may not determine applicant compensation based on the applicant's salary history information, even if voluntarily disclosed.[12]

At first glance, depending upon the jurisdiction, employers may believe they can consider or rely upon an applicant's voluntarily disclosed salary history information in setting an applicant's compensation. As discussed above, a handful of the salary history bans, including those in California and New York, expressly provide that such action can be lawful.[13] Although reasonable, this assumption overlooks a crucial element of the broader equal pay landscape: what happens when the individuals in question go from job applicants, the primary subjects of salary history legislation, to current employees? If an employer hires a job applicant and, lawfully, sets that applicant's salary based upon voluntarily disclosed salary history information, then what happens if there is a resulting pay disparity between the new employee and their peers who perform substantially similar work? Can an employer successfully defend against an equal pay claim and point to the salary history ban's exception for voluntary disclosures?

In most instances, reliance on a current employee's salary history to justify a wage differential carries risk. As discussed more fully below, once applicants become full-fledged employees they can fall under the jurisdiction of applicable equal pay laws, potentially at the state and/or federal level. Within the context of an equal pay claim, some state equal pay laws expressly prohibit reliance on an applicant's prior salary to justify a pay disparity between comparable employees of different protected categories (typically sex, race or ethnicity).[14] At the federal level, there is a circuit split as to whether the same prohibition applies to claims that arise under the federal Equal Pay Act.

WHEN SALARY HISTORY BANS ABUT EQUAL PAY PROTECTIONS: CURRENT EMPLOYEES AND THE RISKS OF SALARY HISTORY RELIANCE IN SETTING CURRENT EMPLOYEE COMPENSATION

Salary history bans are not the first form of legislation aimed at shrinking the gender pay gap. The federal Equal Pay Act was enacted in 1963, and many states across the country have had their own equal pay legislation – legislation that generally prohibits compensation differences between comparable employees of the opposite sex – on the books since the mid-twentieth century. As noted above, although the original aim of equal pay legislation was to address disparate compensation between comparable employees of the opposite sex – as does the federal Equal

Pay Act, which itself provides protections on the basis of sex only[15] – many state equal pay statutes expand their protections beyond the categories of sex or gender.[16] In these jurisdictions, the protected categories are expanded to include race, ethnicity and in some instances, additional protected classifications.[17]

Generally, equal pay legislation, at the federal and state level, provides that employers must pay employees equally, irrespective of gender or other protected categories, where the employees perform substantially similar work under similar working conditions.[18] The standard setting forth the level of similarity required between the positions in question depends on the jurisdiction.

However, like the federal EPA, equal pay legislation in many, but certainly not all states,[19] provides four exceptions to the statute's general equal pay for substantially similar work requirement.[20] Thus, if a pay disparity exists between employees of the opposite sex, then employers may defend against the claim by proving one of four statutory affirmative defenses, which provide that the pay disparity is the result of: (1) a seniority compensation system; (2) a merit-based compensation system; (3) a compensation system that sets compensation based on the quantity or quality of production; or, (4) the fourth "catchall" exception, which provides that a pay disparity will be deemed lawful if relates to any factor other than sex.[21]

Against this backdrop, the relevant question is whether voluntarily disclosed salary history constitutes a "factor other than sex" under the federal equal pay statute or in those states that include some form of the catchall exception.[22] Some state legislation answers this question directly. For example, the California salary history ban provides that nothing in the legislation prohibits employers from relying on current employee salary history information in making compensation decisions for current employees. As noted above, the statute also provides that employers may consider an applicant's salary history information if that information is voluntary disclosed. Importantly, however, the salary history ban also provides that prior salary cannot justify "any disparity in compensation" within the context of a claim under the California Equal Pay Act.[23] The California EPA itself likewise provides that salary history cannot – in any way – excuse a pay disparity between employees of differing protected classes. In practice, this means an employer may lawfully consider a current employee's existing salary in setting that employee's compensation, "so long as any wage differential resulting from that compensation decision is justified" by one of the four general exceptions permitted under the California EPA.[24] In effect, this means that under the California EPA, prior salary is not a "bona fide factor other than sex" within the meaning of the California EPA's fourth catchall exception.

Similarly, the equal pay legislation of New York and Illinois, provide that an employer may not use a current employee's previous wage or salary history as an affirmative defense to justify a wage disparity

between comparable employees of opposite protected categories within the context of an equal pay claim.[25] Thus, if an employer pays a female employee less than a male employee for performing comparable work then the employer may not defend that pay disparity on the basis that the female employee made less at her last job, and voluntarily disclosed this information during the interview process. In short, within these jurisdictions, prior salary is not generally considered to be a gender-neutral factor that falls within the purview of the fourth catchall exception of equal pay legislation.

To complicate matters, not all state equal pay legislation follows the model set by the federal Equal Pay Act. For example, some state legislation generally prohibits discrimination in compensation on the basis of employee protected characteristics, but does not provide enumerated affirmative defense exceptions that an employer may use to defend against a compensation discrimination claim.[26] Other legislation generally mirrors the federal Equal Pay Act, and provides statutory exceptions for seniority or merit based compensation systems, but excludes the fourth catchall exception.[27] Still other statutes incorporate some of the exceptions provided by the federal Equal Pay Act, excluding the catchall exception, and include other additional exceptions, such as compensation systems based on shift differentials, differences in location of employment, or differences due to executive training programs.[28]

Moreover, some of the more recently amended equal pay statutes move farther away from the federal model. These statues do not include a catchall exception and instead incorporate a longer, more specific list of exceptions through which an employer can seek to legitimize a pay differential between comparable employees.[29] For example, Colorado's newly amended equal pay statute, which has yet to take effect, provides that an employer may excuse a wage differential between comparable employees of the opposite sex[30] where the employer demonstrates that the wage differential is based on a seniority system, a merit system, a system that measures earning by quantity or quality of production, the geographic location where the work is performed, education, training or experience to the extent these factors are reasonably job-related to the work being performed; or travel, if the travel is a regular and necessary condition of the position at issue.[31] Notably, the amended statute expressly provides that salary history cannot be relied upon to justify a wage disparity under the section.[32]

Oregon likewise provides that an employer may avoid equal pay liability if the compensation differential at issue is based on one or more of eight expressly enumerated factors, of which the first three closely mirror the federal Equal Pay Act, but the last five go further to include: workplace locations, travel (if travel is necessary and regular for the employee), education, training or experience.[33] Similarly the Massachusetts statute includes six exceptions to the general prohibition against compensation discrimination. More specifically, the statute provides that variations in wages between employees performing comparable work shall not

be prohibited if based on: a seniority system (provided, however, "that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority"); a merit system; a system which measures earnings by quantity or quality of production, sales, or revenue; the geographic location in which a job is performed; education, training or experience to the extent such factors are reasonably related to the particular job in question; or travel, if the travel is a regular and necessary condition of the particular job.[34] The Massachusetts statute likewise expressly provides that an employee's salary history shall not be a defense to an equal pay claim under the statute.[35]

Thus, under some state equal pay statutes, reliance on salary history in setting employee compensation is, at worst, *per se* unlawful, and, at best, highly inadvisable. As discussed above, in those states that follow the model of the federal Equal Pay Act and include a catchall exception – such as California, New York and Illinois – the statutes may expressly prohibit reliance on salary history in excusing a pay differential between comparable current employees. Further, in those states that do not follow the federal model, or fail include a catchall exception – including Colorado, Oregon, Massachusetts, and Washington – reliance on salary history as a legitimate factor sufficient to excuse a wage disparity is expressly or impliedly prohibited.

RELIANCE ON SALARY HISTORY FOR CURRENT EMPLOYEES: FEDERAL EQUAL PAY CLAIMS AND THE CIRCUIT SPLIT

Adding additional complexity to the question of whether an employer may lawfully rely upon salary history in setting employee compensation, there is presently a split between the federal circuit courts of appeal as to whether employee salary history constitutes a legitimate "factor other than sex" within the context of the fourth catchall exception under the federal Equal Pay Act.

The circuit split attained renewed attention in April 2018 when the U.S. Court of Appeals for the Ninth Circuit issued a decision that announced the most progressive stance yet with respect to whether and when an employer may rely upon an employee's prior salary in defending against a federal equal pay claim. In *Rizo v. Yovino*,[36] the Ninth Circuit held that to avail themselves of the fourth catchall exception under the federal EPA – the "factor other than sex" affirmative defense – employers must establish that the relied-upon factor accounting for the pay disparity at issue was job-related and consistent with business necessity.[37] The Ninth Circuit went further and expressly held that it is impermissible for employers to rely upon prior salary to set initial wages for employees, and, that prior salary "alone or in combination with other factors" cannot justify a wage differential under the federal Equal Pay Act.[38]

Importantly, in February 2019, the U.S. Supreme Court vacated the Ninth Circuit's decision because the judge who authored the majority decision was deceased at the time the decision was released.[39] Almost exactly one year later, in February 2020, the Ninth Circuit issued its decision in *Rizo* on remand from the Supreme Court. Consistent with its prior decision, the Ninth Circuit reaffirmed that "only job-related factors may serve as affirmative defenses to EPA claims" and that an employee's prior salary could not be used as an affirmative defense within the context of a federal EPA claim.[40]

The *Rizo* decisions have received substantial attention with respect to their holdings, which confirm that, within the Ninth Circuit, prior salary cannot be used to justify a wage differential between employees under the catchall exception. However, it is important to remember that the question of whether the "factor other than sex" relied upon by an employer must be job-related, and whether salary history can ever be considered a lawful factor other than sex, is not new. Indeed, the circuit split dates back to the late 1980s.

The U.S. Courts of Appeals for the Seventh and Eighth Circuits have held that wage disparities based on salary history can qualify as a "factor other than sex" for purposes of the catchall affirmative defense under the federal Equal Pay Act. In *Taylor v. White*, a civilian U.S. Army employee sued her employer, claiming that the Army's salary retention policy, which was used to determine plaintiff's compensation along with the compensation of her comparable peers, was unlawful.[41] The salary retention policy at issue was informal and essentially permitted the Army to protect "red circle rates" of pay.[42] The Army argued that it maintained the policy "to retain skilled employees during periods of time when their services are not required by preventing job loss and allowing employees to perform less demanding, lower grade work without suffering a reduction in grade or salary."[43] Plaintiff and her comparators were transferred to lower paying positions and performed substantially similar work. However, due to the salary retention policy, Plaintiff was making less than some of her male comparators. The plaintiff claimed that the salary retention policy should not be permitted as a defense under the catchall exception of the EPA because reliance on salary history allowed for "the perpetuation of unequal wage structures."[44] The Eight Circuit disagreed and refused to adopt a *per se* rule that would exclude salary retention policies or salary history as qualifying "factors other than sex."[45] Instead, the Eight Circuit concluded that a case-by-case analysis was required to determine whether an employer's particular reliance on prior salary or salary retention policies fell within the federal EPA's fourth catchall exception as a "factor other than sex."[46]

Similarly, in *Covington v. Southern Illinois University*, the Seventh Circuit also examined an equal pay claim within the context of a salary retention policy.[47] In *Covington*, a female assistant professor claimed that her university employer violated Title VII and the federal EPA when it paid her less than her male predecessor. In analyzing her claims, the

Seventh Circuit concluded that the plaintiff's low starting salary, relative to that of her male predecessor, was due in part to her comparatively low experience level.[48] Additionally, however, in affirming the district court's decision in favor of the employer, the Seventh Circuit excused the pay disparity principally because it was caused by a salary retention policy, which permitted the plaintiff's male predecessor to maintain his higher salary when he transferred between various university departments prior to his departure. The court determined that employers "should be permitted to consider the wages it paid to an employee in another position" unless there was evidence that the policy discriminated against employees on the basis of sex.[49]

Conversely, similar to the Ninth Circuit in *Rizo*, the U.S. Courts of Appeals for the Second, Fourth, Sixth, Tenth, and Eleventh Circuits have held, or suggested in *dicta*, that the EPA's fourth catchall exception must be limited to job-related factors, and in some instances, have held that prior pay alone is not a legitimate "factor other than sex," and therefore, cannot justify a compensation disparity.

For example, in *Aldrich v. Randolph Cent. Sch. Dist.*, a female employee, who was employed by the school district defendant as a cleaner, brought suit alleging sex-based wage discrimination.[50] The school district classified the "cleaner" position at a lower classification level than a similar "custodian" position, and as a result, paid the cleaners at a lower rage rate.[51] The plaintiff worked alongside two male custodians and complained that she performed identical to the work performed by the custodians, but was paid less.[52] The school district pointed to its civil service examination and classification system and argued that, because the classification system and exam were sex-neutral on their face, they qualified as factors other than sex under the federal EPA.[53] The Second Circuit disagreed and concluded that reliance on a facially neutral civil service exam or job classification system because they each represented "*a* factor other than sex" fell short of the standard required by the federal EPA.[54] The Second Circuit determined that in order to avail itself of the catchall affirmative defense an employer bears the burden of proving that a bona fide business and job-related reason explains the employer's reliance on the gender-neutral factor at issue.[55] Accordingly, in order to successfully use the civil service exam and job classification system a valid factors other than sex, the school district employer would be required the prove that the "exam for custodians and the practice of filing the custodian's position only from among the top three scorers on the exam are related to performance of the custodian's job."[56]

In *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*, the Fourth Circuit suggested in dicta that in order to avail itself of the federal EPA's fourth catchall exception, the employer must prove that its proffered reason explaining the wage disparity at issue was job related.[57] In *Maryland Ins. Admin*, the Fourth Circuit vacated a district court's order granting summary judgment in favor of the employer, the Maryland Insurance Administration ("MIA"). The EEOC argued that the

female employees on whose behalf it brought suit, three insurance fraud investigators, were assigned lower starting salaries upon hire and earned less than the male comparators, despite the fact that they performed identical work.[58] MIA argued that any resulting pay disparity between the male and female insurance fraud investigators was excused by gender-neutral reasons, including its use of the state's standard salary schedule, which assigned newly hired employees to a specific compensation grade and step level upon hire.[59] The Fourth Circuit examined the employer's compensation system and determined that although "MIA uses a facially gender-neutral compensation system, MIA still must present evidence that the *job-related* distinctions underlying the salary plan, including prior state employment, in fact motivated MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries."[60] The Fourth Circuit concluded that the gender-neutral reasons provided by the employer did not, as a matter of law, explain the wage disparities at issue. The Fourth Circuit reiterated that, especially at the summary judgment stage, an employer must not only prove that the "factor other than sex *could* explain or *may* explain the salary disparity [but rather] the EPA requires that a factor other than sex *in fact* explains the salary disparity."[61]

In *E.E.O.C. v. J.C. Penney Co.*, the Sixth Circuit examined a "head of household" eligibility test for spousal health care benefit coverage utilized by the employer to justify differences in employee benefit coverage.[62] The requirement provided that a J.C. Penney employee could elect benefits coverage for their spouse only if the spouse earned less than the employee.[63] The EEOC claimed that this requirement had a disparate impact on female employees.[64] Although the Sixth Circuit ultimately concluded that the "head of household" eligibility requirement was a valid factor other than sex under the federal EPA, it rejected the employer's argument the federal EPA allowed a wage differential if it is based on literally any factor other than sex.[65] Instead, the Sixth Circuit concluded that in order to constitute a valid factor other than sex, the factor at issue must, at minimum, have been adopted for "a legitimate business reason."[66]

Similarly, in *Riser v. QEP Energy*, the Tenth Circuit examined an employer's pay classification system that based employee compensation on industry compensation data and assigned pay grades to employees based on this data.[67] The classification system at issue did not take into account an employee's actual job responsibilities.[68] In analyzing the plaintiff's equal pay claim, the Tenth Circuit concluded that a bona fide gender neutral pay classification system can constitute a "factor other than sex" under the federal EPA only where any wage differential that results from the classification system is based on "legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."[69] The Tenth Circuit went on to affirm that an employer was precluded from relying solely upon an employee's prior salary to justify a pay disparity for purposes of the "factor other than sex" affirmative defense.[70]

Finally, in *Glenn v. Gen. Motors Corp.*, the Eleventh Circuit likewise concluded that the factor other than sex exception required that any pay disparity be job-related, and, that salary history alone would not constitute a valid factor other than sex.[71] In *Glenn*, the plaintiffs earned less than their male comparators and had lower starting salaries as compared to male comparators hired around the same time.[72] Similar to the salary retention policy in *Taylor v. White*, the wage differentials between plaintiffs and their male comparators were due to a transfer policy, which applied to employees who transferred from hourly to salaried positions.[73] The employer claimed that it maintained a time-honored, unwritten policy that protected hourly employees from taking a pay cut when they transferred into a salaried position to encourage employees to move from hourly wage jobs to salary-tracked positions. The employer argued that this policy constituted a factor other than sex and legitimized the resulting pay disparities.[74] The Eleventh Circuit disagreed and concluded the employer's argument amounted to little more than some version of the unlawful market force theory – that women, as women, may be paid less because they are valued less than men in the American work market, or, because they may be willing to work for less than a man.[75] Instead, the Eleventh Circuit concluded that a valid factor other than sex applies "when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." Like the Tenth Circuit, the Eleventh Circuit expressly acknowledged that "prior salary alone" could not justify a pay disparity.[76]

Whether prior salary can be a legitimate "factor other than sex" for purposes of the federal EPA's fourth catchall exception is a question of jurisdiction. Employers facing equal pay claims in the Seventh or Eighth Circuits stand a better chance of defending a federal EPA claim based on consideration of an employee's prior salary.[77] On the other hand, the majority of federal appellate courts to address this question – the Ninth, Tenth, Second, Fourth, Sixth and Eleventh – have made clear that any wage differential must be justified by job-related factors, which may not include prior salary.

BEST BET? EMPLOYER COMPENSATION SYSTEMS THAT RELY ON JOB-RELATED FACTORS, NOT SALARY HISTORY

Employer consideration of prior salary in making compensation decisions, for applicants or current employees, carries implicit risk. Even where salary history bans expressly provide that employers can rely upon an applicant's voluntarily disclosed salary history information, or, suggest that nothing in the salary history ban prohibits an employer from considering a current employee's salary in making compensation decisions, reliance on salary history exists within a wider legislative minefield.

For those states that maintain their own equal pay statutes, there are countless reasons why reliance on salary history could be deemed unlawful: because it is expressly excluded from consideration as a legitimate factor sufficient to excuse a wage differential, or, because it does not otherwise comply with a statute's specific legislative exceptions. Within the federal landscape, six of the eight federal appellate courts to review the issue have determined that the federal Equal Pay Act's "factor other than sex" exception can only be used where the gender-neutral factor at issue is job-related, which as a result, excludes disparities resulting from sole reliance on salary history.

Although salary history has been a routine basis upon which American employers have commonly based compensation decisions, reliance on salary history is no longer advisable. Employers should reexamine their current compensation systems. If these systems rely, directly or indirectly, upon an applicant or current employee's salary history, then employers should first confirm whether such reliance is lawful under the state equal pay or salary history legislation applicable to them (if any). As discussed above, employers in California, Colorado, New York, Illinois, Massachusetts, Oregon, and Washington, should pay special attention to relevant legislative prohibitions. Further, depending on the federal appellate jurisdiction in question, employers should keep in mind that reliance on salary history may not fall within the federal Equal Pay Act's "factor other than sex" affirmative defense. The most prudent course of action for employers is to eliminate considerations of prior salary in compensation decisions, as they may be deemed unlawful under multiple legislative schemes. Employers should instead base compensation decisions upon factors that are job-related, or, which fall under one or more of the relevant statutory-approved factors, such as geographic location, experience, education or training.

Further, employers should consider conducting a privileged, pay equity audit to determine whether any pay disparities exist between employees of opposite protected classes who perform substantially similar work. As discussed above, although the original aim of the salary history bans and equal pay legislation was to cure the gender pay gap, many state equal pay statutes have been amended to include other protected categories, including race and ethnicity.[78] If such disparities exist, the strongest defense available to employers is to prove that any such disparity can be explained by gender-neutral, job-related factors, such as experience, training, performance, a regional difference in market compensation levels, or education. Until employers perform an audit, they will not know whether such disparities exist, or, what legitimate factors are available to explain such disparities. It is doubtless preferable to learn whether pay disparities between comparable employees exist within the confines of a privileged audit, rather than through the course of litigation discovery.

NOTES

1. *Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 467 (7th Cir. 2005).

2. *Don't Ask Me About my Salary History*, Kristin Wong, *https://www.nytimes.com/2019/10/22/us/dont-ask-me-about-my-salary-history.html*. *See, also*, Columbia Code of Ordinances § 2-352 (Columbia, South Carolina recently amended its salary history ban to exclude private employers from the application of the ordinance; as a result the ordinance applies only to the City of Columbia or those private employers who have contracts or vending relationships with the city).

3. Cal. Lab. Code § 432.3(i); San Francisco Police Code § 3300J.4(g), (h); Del. Code Ann. tit. 19, § 709B(d); Haw. Rev. Stat. § 378-2.4; 820 Ill. Comp. Stat. 112/10(b-15); Massachusetts Office of the Attorney General, *An Act to Establish Pay Equity: Overview and Frequently Asked Questions* (March 1, 2018); Kansas City Code of Ordinances § 38-102; New York Department of Labor, Salary History Ban – What You Need To Know; New York City Commission on Human Rights Employer Fact Sheet: Protections Against Inquiries Into Job Applicants' Salary History; New York City Commission on Human Rights Salary History Law Frequently Asked Questions; Cincinnati Muni. Code § 804-01; Toledo Muni. Code § 768.01(e); Philadelphia Commission on Human Relations Regulation No. 7.4(b); Vt. Stat. Ann. tit. 21, § 495m(c).

4. Cal. Lab. Code § 432.3(g), (h); San Francisco Police Code § 3300J.4(e), (f); Haw. Rev. Stat. § 378-2.4; 2018 New Jersey Assembly Bill No. 1094 (July 24, 2019); N.Y. Lab. Law § 194-a, *see, also*, New York Department of Labor, Salary History Ban – What You Need To Know, *https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know*; N.Y.C. Admin. Code § 8-107(25)(d); Kansas City Code of Ordinances § 38-102; Westchester Cty., N.Y. Code of Ordinances § 700.03(9)("an employer may rely on prior wage history when it is voluntarily provided by a prospective employee to support a wage higher than the wage offered by the employer"); Cincinnati Muni. Code § 804-03; Toledo Muni. Code § 768.02(d); Philadelphia Code § 9-1131.

5. Cal. Lab. Code § 432.3(g), (h); San Francisco Police Code § 3300J.4(e), (f); Conn. Gen. Stat. § 31-40z(a)(5); Haw. Rev. Stat. § 378-2.4; 820 Ill. Comp. Stat. 112/10(b-20); Me. Stat. tit. 5, § 4577; Mass. Gen. Laws ch. 149, § 105A(c)(2); Kansas City Code of Ordinances § 38-102; 2018 New Jersey Assembly Bill No. 1094 (July 24, 2019); N.Y. Lab. Law § 194-a, *see, also*, New York Department of Labor, Salary History Ban – What You Need To Know, *https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know*; N.Y.C. Admin. Code § 8-107(25)(d); Kansas City Code of Ordinances § 38-102; Westchester Cty., N.Y. Code of Ordinances § 700.03(9); Cincinnati Muni. Code § 804-03; Toledo Muni. Code § 768.02(d); Or. Admin. R. 839-008-0005(3); Philadelphia Code § 9-1131; Puerto Rico Law No. 16 (March 8, 2017) art. 4(a)(1); Vt. Stat. Ann. tit. 21, § 495m(b); Washington HB 1696 (2019).

6. *See generally* 820 Ill. Comp. Stat. 112/10(b-20). Mass. Gen. Laws ch. 149, § 105A(c)(2); New Jersey AB 1094 (2019); N.Y. Lab. Law § 194-a(2); Philadelphia Code § 9-1131(2)(a)(ii).

7. *See generally* Haw. Rev. Stat. § 378-2.4.; New Jersey AB 1094 (2019); N.Y. Lab. Law § 194-a(2); Me. Stat. tit. 5, § 4577; Mass. Gen. Laws ch. 149, § 105A; Vt. Stat. Ann. tit. 21, § 495m(b); Washington HB 1696 (2019).

8. In some legislation, there is a requirement that the verification is only allowed after the employer has made an offer of employment with compensation to the applicant. *See e.g.*, Vt. Stat. Ann. tit. 21, § 495m(b); Washington HB 1696 (2019).

9. *See generally* Cal. Lab. Code § 432.3(g), (h); Haw. Rev. Stat. § 378-2.4.; New Jersey AB 1094 (2019); N.Y. Lab. Law § 194-a(2); Vt. Stat. Ann. tit. 21, § 495m(b); Cincinnati Muni. Code § 804-03; Toledo Muni. Code § 768.02(d).

10. 820 Ill. Comp. Stat. 112/10(b-20).

11. 820 Ill. Comp. Stat. 112/10(b-20).

12. Or. Admin. R. 839-008-0005(4).

13. Cal. Lab. Code § 432.3(g), (h); N.Y. Lab. Law § 194-a, *see, also*, New York Department of Labor, Salary History Ban – What You Need To Know, *https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know*.

14. It is important to note that sex and gender are not the only protected categories encompassed by state equal pay legislation. Under many equal pay statutes, gender is one of multiple protected categories, including race or ethnicity. See Ala. Code § 25-1-30 ("sex or race"); Cal. Lab. Code § 1197.5 ("opposite sex" or "race or ethnicity"); D.C. Code § 2-1402.11(a) (prohibits compensation discrimination on basis of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual"); Haw. Rev. Stat. §§ 387-1, 387-4, Haw. Rev. Stat. Ann. § 378-2.3 (although Hawaii's equal pay statute relates only to sex, Hawaii's wage and hour statute prohibits employers from discriminating in any way in the payment of wages on the basis of race, religion, or sex); 820 Ill. Comp. Stat. 112/10(a) ("sex" or "African-American" status); Iowa Code § 216.6A (employer may not commit compensation discrimination on basis of "age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability"); La. Rev. Stat. § 23:332 (although the compensation protections only apply to employees of "opposite sex" the statute provides that an employer may avail themselves of the relevant affirmative defenses only if the pay differences at issue "are not the result of an intention to discriminate because of race, color, religion, sex, or national origin"); Kansas City Code of Ordinances § 38-103(a) (covered employers are prohibited from discriminating against any individual with respect to compensation because of such individual's "race, color, sex, religion, national origin or ancestry, disability, sexual orientation, gender identity or age"); N.J. Stat. Ann.. § 34:11-56.2, NJ LEGIS 436 (2019), 2019 NJ Sess. Law Serv. Ch. 436 (SENATE 3878) ("protected class"); N.Y. Lab. Law § 194 ("protected class or classes"); N.C. Gen. Stat. § 168A-5, 169A-9 (North Carolina's Disabilities Protections Act expressly prohibits compensation discrimination on the basis of disability); Ohio Rev. Code Ann. § 4111.17 ("race, color, religion, sex, age, national origin, or ancestry"); Or. Rev. Stat. § 652.220 ("protected class"); S.C. Code Ann. § 1-13-80("race, religion, color, sex, age, national origin, or disability"); Tex. Lab. Code Ann. §§ 21.002, 21.051 ("race, color, disability, religion, sex, national origin, or age"); Utah Code Ann. §§ 34A-5-102, 34A-5-106 ("race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, disability, sexual orientation; or gender identity").

15. 29 U.S.C.A. § 206(d)(1).

16. *See note* 14, *supra*.

17. *See note* 14, *supra*.

18. *See e.g.*, 29 U.S.C. § 206(d); Ala. Code § 25-1-30; Ariz. Rev. Stat. § 23-341; Ark. Code § 11-4-610; Cal. Lab. Code § 1197.5; 820 Ill. Comp. Stat. 112/10(a).

19. A review of those state equal pay statutes that do not mirror the federal Equal Pay Act to include the four affirmative defense exception factors are discussed more fully below. *See notes* 26-36 below.

20. *See* 29 U.S.C. § 206(d); Ala. Code § 25-1-30; Ariz. Rev. Stat. § 23-341; Ark. Code § 11-4-610; Cal. Lab. Code § 1197.5; Conn. Gen. Stat. § 31-75; Del. Code Ann. tit. 19, § 1107A; Fla. Stat. § 448.07; Ga. Code Ann. § 34-5-3; Haw. Rev. Stat. § 378-2.3(a); 820 Ill. Comp. Stat. 112/10(a); Ind. Code § 22-2-2-4; Iowa Code § 216.6A; Kan. Stat. § 44-1205; La. Rev. Stat. § 23:332; Md. Code Ann., Lab. & Empl. § 3-304; Mich. Comp. Laws §§ 408.412, 408.423; Minn. Stat. § 181.67; Mo. Rev. Stat. § 290.410; Nev. Rev. Stat. § 608.17; N.H. Rev. Stat. Ann. § 275:37; N.J. Stat. Ann. § 10:5-12(t); N.Y. Lab. Law §§ 190, 194; N.D. Cent. Code § 34-06.1-03; Ohio Rev. Code §§ 4111.14, 4111.17; Okla. Stat. tit. 40, § 198.1; 43 Pa. Cons. Stat. § 336.3; R.I. Gen. Laws § 28-6-18; Tenn. Code Ann. § 50-2-202; Vt. Stat. Ann. tit. 21, § 495; Va. Code Ann. § 40.1-28.6; W. Va. Code §§ 21-5B-1, 21-5B-3; Wyo. Stat. § 27-4-302.

21. *See* note 19, *supra*.

22. *See* note 19, *supra*. A review of those states that do not include a catchall exception are discussed further below.

23. Cal. Lab. Code § 432.3; § 1197.5.

24. Cal. Lab. Code § 1197.5.

25. 820 Ill. Comp. Stat. 112/10(b-20); N.Y. Lab. Law § 194-a, *see, also*, New York Department of Labor, Salary History Ban – What You Need To Know, *https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know*. *See, also*, Colo. Rev. Stat. § 8-5-102 (as amended by Colorado SB 85 (2019)); Mass. Gen. Laws ch. 149, § 105A.

26. Alaska Stat. § 18.80.220; D.C. Code § 2-1402.11; Mont. Code Ann. § 39-3-104; Wis. Stat. § 111.36.

27. Idaho Code Ann. § 44-1702; Ky. Rev. Stat. §§ 337.420, 337.423; Neb. Rev. Stat. §§ 48-1220, 48-1221; N.M. Stat. §§ 28-23-2, 28-23-3; S.C. Code Ann. § 1-13-80; Tex. Lab. Code Ann. § 21.102.

28. Me. Stat. tit. 26, § 628; N.C. Gen. Stat. § 168A-9; S.D. Codified Laws § 60-12-16.

29. Colo. Rev. Stat. § 8-5-102 (as amended by Colorado SB 85 (2019), becomes effective January 1, 2021); Mass. Gen. Laws ch. 149, § 105A; Or. Rev. Stat. § 652.235; Wash. Rev. Code § 49.58.020.

30. "An employer shall not discriminate between employees on the basis of *sex, or on the basis of sex in combination with another protected status* as described in section 24-34-402(1)(a). . . ." Colo. Rev. Stat. Ann. § 8-5-102 (1)(emphasis added).

31. Colo. Rev. Stat. § 8-5-102 (as amended by Colorado SB 85 (2019)).

32. *Id*. § 8-5-102(1)(d).

33. Or. Rev. Stat. Ann. § 652.220. Or. Admin. R. 839-008-0015 also provides additional examples of what may qualify as a "workplace location considerations," "travel," "education" "training" and "experience" as contemplated by the statute. For example, "workplace location confiscations" may include cost of living, desirability of worksite location, access to worksite location, minimum wage zones or wage and hour zones. Education considerations may include "substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program." Training considerations may include "on-the-job training acquired in current or past positions as well as training

acquired through a formal training program." Experience considerations may include "any relevant experience that may be applied to the particular job." *Id*.

34. Mass. Gen. Laws Ann. ch. 149, § 105A(b).

35. *Id*.

36. *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 706, 203 L. Ed. 2d 38 (2019)("Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the Act. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.").

37. *Id*. at 456.

38. *Id*. at 456-457.

39. *Yovino v. Rizo*, 139 S. Ct. 706, 203 L. Ed. 2d 38 (2019).

40. *Rizo v. Yovino*, 950 F.3d 1217, 1219-1220 (9th Cir. 2020). While the Ninth Circuit's conclusion in the 2020 *Rizo* decision was identical to that of the 2018 *Rizo* decision, the 2020 decision highlighted an important aspect of the federal equal pay landscape with respect to the applicable burden-shifting framework. The Court ruled that equal pay claims consists of two steps: "(1) the plaintiff bars the burden to establish a prima facie showing of a sex-based wage differential; (2) if the plaintiff is successful, the burden shifts to the employer to show an affirmative defense." *Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020). The Court thus clarified that "no showing of pretext" is required by an equal pay plaintiff and that the three-step *McDonnell-Douglas* burden shifting framework that exists within the context of employment discrimination claims under Title VII of the Civil Rights Act of 1964 is inapplicable to claims under the federal Equal Pay Act. *Id*. at 1222-1224. In short, "[u]nlike Title VII, the EPA does not require proof of discriminatory intent." *Id*. at 1223.

41. *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003).

42. This term typically describes a situation in which an employee is transferred or demoted to a lower position, through no fault of their own, but is allowed to maintain their previous, higher wage rate despite the transfer or demotion. The phrase "is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs." H.R.Rep. No. 309, 88th Cong., 1st Sess. 3, reprinted in 1963 U.S. Code Cong. & Admin. News 687, 689.

43. *Taylor*, 321 F.3d at 716.

44. *Id*.

45. *Taylor v. White*, 321 F.3d 710, 718-720 (8th Cir. 2003).

46. *See Taylor v. White*, 321 F.3d 710, 718, 720 (8th Cir. 2003)("[A]lthough we recognize that an employer might apply a salary retention policy in a discriminatory fashion or use such a policy as a vehicle to perpetuate historically unequal wages caused by past discrimination,

these potential abuses do not provide valid bases to adopt a per se rule that declares all salary retention practices inherently discriminatory. Rather, these risks simply highlight the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay. . . . [W]e believe a case-by case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense.").

47. *Covington v. S. Illinois Univ.,* 816 F.2d 317 (7th Cir. 1987)(rejecting the plaintiff's argument that factors other than sex must be related to the requirements of the particular position in question and held that a university's salary retention policy was a qualifying factor other than sex under the federal EPA).

48. *Covington*, 816 F.2d at 324.

49. *Covington*, 816 F.2d at 323. *See, also, Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 470 (7th Cir. 2005)("The factor [other than sex] need not be 'related to the requirements of the particular position in question,' nor must it even be business-related.")(*citing Dey v. Colt Construction & Development Co.*, 28 F.3d 1446 (7th Cir.1994)).

50. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992).

51. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 522-523 (2d Cir. 1992).

52. *Id.*

53. *Id.* at 524.

54. *Id.* at 526-527 (emphasis in original).

55. *Id.* at 526.

56. *Id.* at 527. *See, also, Aldrich.*, 963 F.2d at 525 ("Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue. . . . Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.").

57. *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018). The court in *Maryland Ins. Admin.*, further highlighted the high bar an employer in required to meet in order to successfully move for summary judgment with respect to an equal pay claim. In reviewing the district court's decision, the Fourth Circuit emphasized that "once the plaintiff has established a prima facie case the employer will not prevail at the summary judgment stage unless the employer proves its affirmative defense so convincingly that a rational jury could not have reached a contrary conclusion." *Id.* at 121.

58. *Id.* at 119.

59. *Id.* Further, similar to other defendant salary retention systems discussed in this section, MIA's standard salary schedule permitted Maryland government employees who transferred to a lateral position within the state to maintain their assigned compensation grade and step to their new position. *Id.* at 117.

60. *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018)(emphasis added). "MIA cannot shield itself from liability under the EPA solely because MIA uses the state's Standard Salary Schedule and awards credit for

prior state employment or a lateral transfer within the state employment system. . . . Although the Standard Salary Schedule is facially neutral, MIA exercises discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire's qualifications and experience. A fact finder faced with the present record could have determined that, when exercising this discretion, MIA at least in part based its assignment of the claimants' step levels on their gender with a resulting diminution of their assigned starting salary." *Id*. at 122-123.

61. *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin*., 879 F.3d 114, 123 (4th Cir. 2018)(emphasis in original).

62. *E.E.O.C. v. J.C. Penney Co*., 843 F.2d 249, 253 (6th Cir. 1988) ("[T]he 'factor other than sex' defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason . . . [w]e now hold that the legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense.").

63. *Id*. at 250-251.

64. *Id*.

65. *Id*. at 253-254.

66. *Id*. at 523.

67. *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015)("[T]he EPA 'precludes an employer from relying solely upon a prior salary to justify pay disparity.'")(citations omitted).

68. *Id*. at 1193.

69. *Id*. at 1198. (citations omitted).

70. *Id*. at 1199.

71. *Glenn v. Gen. Motors Corp*., 841 F.2d 1567, 1571 (11th Cir. 1988) ("[T]he 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business . . . prior salary alone cannot justify pay disparity.").

72. *Id*. at 1569.

73. *Id*. at 1570.

74. *Id*. at 1570.

75. *Id*.

76. *Id*. at 1571.

77. However, even if the federal appellate jurisdiction in which an employer is located permits salary history to be considered as a "factor other than sex" under the federal Equal Pay Statute, employers should pay attention to applicable state equal pay statutes, which may incorporate different standards for the state law than those upheld by the federal appellate court with regard to the federal legislation. For example, Illinois falls within the Seventh Circuit. Importantly, the Illinois Equal Pay Act expressly precludes an employer from relying on prior salary to justify a wage disparity within the context of a state equal pay claim under the statute.

78. *See note* 14, *supra*.