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Equal Pay Day And The US Pay Equity Landscape

By **Dan Forman** (April 1, 2019, 11:50 AM EDT)

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Equal Pay Day symbolizes how far into the current year women must work, on average, to reach the same level of compensation that male workers earned in the prior year in the United States. Falling on April 2, this year, 17 days earlier than in 2005, Equal Pay Day 2019 shows movement toward pay equity.

On March 8, International Women's Day, the U.S. women's national soccer team's players sued their employer, the United States Soccer Federation, in a combination complaint as a collective action under the Equal Pay Act and as a class action under Title VII of the Civil Rights Act of 1964 in the U.S. District Court for the Central District of California.[1]

Under the Equal Pay Act, the complaint seeks back pay, interest, liquidated damages, and attorney fees and costs for the group comprised of all current and former women's national soccer team employees in the past three years. Neither the WNT, nor the players' bargaining agent, the U.S. Women's National Team Players Association, or WNTPA, are parties in the lawsuit.

Public Responses

The filing, on International Women's Day, garnered significant publicity due to the plaintiffs' solidarity (28 player plaintiffs) and their world champion status with the defense of the World Cup coming this summer. The USSF responded to the filing with a press release claiming that it honored the collective bargaining agreement reached with the WNTPA and asserted its commitment to the women players stating, "our continued support and efforts toward enriching the women's game is every bit as certain today as it will be in the future."

The men's soccer team players association, working under an expired contract and with aspirations of receiving a new offer from the USSF, announced that it is "committed to the concept of a revenue-sharing model to address the U.S. Soccer Federation's 'market realities' and find a way towards fair compensation" including, an "equal division of revenue attributable to the MNT and WNT programs …"

Potential Damages Under EPA

Every employer should be aware that under the Equal Pay Act, a plaintiff is entitled to the underpayment that she would have received for equal work, as damages, plus an additional equal amount as liquidated damages. Plaintiffs may not be awarded emotional distress, pain and suffering, or damages for lost opportunities. Damages are subject to a two-year statute of limitation or three years if the wage differential is found to be willful. If the plaintiff proves that the employer knew or showed reckless disregard for whether the underpayment was prohibited by law, a willful violation will be established. If the employer did not know or only knew that the law was *potentially* applicable, the underpayment should not be considered willful, limiting damages to two years of underpayment.

In addition, after a fact-finder determines the amount of the underpayment the court imposes a liquidated damage in, typically, an equal amount to the underpayment, effectively doubling the recovery. However, the court has the discretion to reduce the liquidated damage portion of any award if it determines that the employer acted in good faith.[2] And, of course, successful plaintiffs are

entitled to attorney fees and costs.

The women's national team players rely on their world champion status to appeal to the equities of their position by asserting that the USSF generated greater revenues and profits from women's national team play than the men's national team. In terms of damages, the players alleged that the players on the men's national team earned a total of $5,375,000 after finishing in round 16 of the World Cup in 2014 and one year later, the USSF paid the women's national team $1,725,000 after winning the World Cup. And, while USSF will, no doubt, point to the smaller playing field in the 2015 women's World Cup, the complaint alleges that, on average, the women's national team played 19 more games in the last three years than their male counterparts.

In addition, the women's national team players identify other differences in payments for tryouts, playing "friendlies" and bonuses since 2013. The plaintiffs intend that these numbers be extrapolated to underpayment damages in the multimillion-dollar range. As the players are represented in collective bargaining, the complaint also alleges that the USSF rejected the WNPTA request for compensation at least equal to that paid to the men to support the claim that any underpayment is intentional and subject to a three-year statute of limitations and liquidated damages.

EPA Applies To All Employers

Equal Pay Act cases require an employment relationship where men and women under the same employer are not provided with equal pay for substantially equal work. However, not all working relationships are employment relationships. For example, many professional sports are competitions for prize money among individual professional players or partnerships, such as tennis, golf, bowling, poker, beach volleyball and surfing. EPA cases should not follow in those sports.

This type of lawsuit is on the rise across the board and is likely to arrive in other professional sports, such as the WNBA. Professional basketball players are members of collective bargaining units, and last November, the Women's National Basketball Players Association opted out of its collective bargaining agreement with the NBA to attempt to force a more favorable negotiation.

Further, many of the WNBA teams are associated with the same city's NBA team and may have some form of common ownership, thus, those clubs may employ men and women for what might be considered substantially equal work. As women break into historically male sports, like football, where professional women's teams do not yet exist, those employers will become targets of potential EPA claims.

Equal pay transcends sport and applies to *all* employers. However, not every wage differential is actionable. To proceed with a claim, a plaintiff must show that the comparator jobs are substantially similarly which can be done by comparing job tasks, skill or educational prerequisites, similar levels of mental or physical effort, responsibility, accountability, and similar working conditions.

The women's national team players claim that their employer, the USSF, requires the plaintiffs and male players to (a) be available for training and games on short notice; (b) maintain a high level of competitive soccer skills and conditioning; (c) not use illegal or banned substances; (d) promote and develop soccer in the United States; (e) participate in media events, interviews, and autograph sessions; (f) adhere to rigorous training, nutrition, physical therapy; (g) attend camps, practices; (h) travel and compete in games of the same length; and (i) follow the rules of FIFA, including playing on same sized fields, for the same number of minutes and rules of conduct.

Due to uniform game rules and playing fields, the USSF will be hard pressed to dispute many of these apparent similarities. Further, to defend against the "substantial similarity" element, the USSF may be hard pressed, due to its own interest in promoting the game of soccer, from drawing distinctions between the men's national team and women's national team playing and working conditions. It remains to be seen whether the USSF will test whether these claims support the element of substantially similar work.

In addition, employers may defend themselves by showing that higher compensation was based on a seniority system rewarding the time of employment. Merit systems, also, provide for defensible wage differences and factors other than sex can be used to justify wage differentials against alleged EPA violations.

There is currently an open question as to whether salary history is a factor that can be relied upon to defend against an EPA claim. While in 2018, the U.S. Court of Appeals for the Ninth Circuit in Rizo v. Yovino held that that "a legitimate 'factor other than sex' must be job related and that prior salary *cannot* justify paying one gender less if equal work is performed …" the U.S. Supreme Court vacated that decision because the Ninth Circuit erred by counting a critical vote supporting the majority opinion cast by a justice who had passed away before the opinion was published.

An open question remains as to whether an employee's salary history can be used to defend wage differentials between similarly situated employees. Employers should be aware that they bear a significant burden when defending against an EPA claim.

New Opportunities and Hurdles[3] On the Road Ahead

In addition, states like California are working to legislate equal pay in all sport, whether employment-related or not. Last year, California's State Lands Commission required pay equity as a condition for a permit to for the Mavericks big-wave professional surfing contest. And, California's assembly is considering Assembly Bill 467, a law to require equal prize money for all athletes, regardless of gender, for any sporting event held on public land. Of import, market forces and/or public relations have resulted in Grand Slam tennis providing equal prize money to men and women.

Other laws may impact this area, such as California's new requirement that California corporations and other publicly traded corporations headquartered in California include women on their boards of directors. By the end of 2019, each corporation must have at least one woman on its board of directors and before the end of 2021, companies with six or more directors must have at least three women directors. Companies that are not in compliance face substantial penalties, so litigation testing the constitutionality of this law is expected.

Whether salary history creates a defense to EPA claims or not, many states are banning the use of salary history on job applications. And, some laws ban any inquiry into an applicant's salary history.

What Employers Can Do

Employers should not pay women less than men in the same location and who perform the same job functions. An employer's policies should include a policy against gender-based wage discrimination. Employers can, in conjunction with their counsel, audit their pay practices to monitor whether pay gaps exist and, if they exist, the reason(s) why.

If gaps exist when examining specific employees, an employer needs to eliminate the gap or be ready to prove that any disparity is based on a factor other than sex. Likewise, whether local laws ban salary history from job applications or not, employers can avoid any inference that a woman's lower history contributed to an EPA violation if the employer does not seek a salary history but simply offers employment based on its guidelines, needs and structure to demonstrate that it creates compensation without regard to gender.

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[1] Alex Morgan, et al., v. United States Soccer Federation, USDC CD No. 2:19-CV-01717.

[2] See, e.g., Glenn v. General Motors Corp .,17 841 F.2d 1567, 1573 (11th Cir. 1988).

[3] Employers should keep on eye on federal legislation such as the Paycheck Fairness Act that passed the House of Representatives on a party line vote on March 27, 2019. While this attempt to

amend and widen the EPA will likely die in the Senate, subsequent legislation or regulatory action could impact EPA litigation and claims.

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