



Employment Practices Liability in the #MeToo Era

Cathryn Thom

In addition to adjudicating and settling customer claims, our Claims Department personnel keep up to date with major market developments. Originally developed for internal training and education purposes, they share their summaries and perspectives on topical issues.

In this paper, Cathryn Thom, Vice President of D&O/E&O Claims, looks at the #MeToo movement and the Equal Pay Act.

In the late 1960's a well-known cigarette brand for women, Virginia Slims, ran an advertisement which stated, "You've come a long way, baby". It is now 2018 and it seems that women have not come far enough. There has been an uptick in lawsuits filed by women alleging they are not being paid the same as their male counterparts. With the recent advent of #MeToo, women are becoming more empowered and are no longer hesitant to file suits.

There was a recent ruling in favor of a female employee by the United States Court of Appeals for the Ninth Circuit in ***Rizo v. Jim Yovino, Fresno County Superintendent of Schools, 869 F.3d 1004 (2017)***, where the court opined, "Although the Act (the Equal Pay Act of 1963) has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy."

The federal Equal Pay Act was intended to ensure employers pay men and women equally for the same equal work. Ms. Rizo was hired as a math consultant by Fresno County and filed suit against her employer after she found out that male math consultants who were hired after her had higher salaries. The suit may be headed to United States Supreme Court.

Equal pay suits usually trigger coverage under a company's Employment Practices Liability Insurance ("EPLI") as well as Directors and Officers ("D&O") policies which may have an EPLI endorsement.

Industries that have seen significant litigation include:

Technology - ***Pan v. Qualcomm, 16-cv-01885, USDC, S.D. Calif. 2017***, settled for \$19.5m.

Pharmaceutical - ***Barrett v. Forest Laboratories, 12-cv-05224 USDC, S.D.N.Y. 2015***, settled for \$4m.

Retail Stores – ***Scott v. Family Dollar, 08-cv-00540 USDC, W.D.N.C 2018***, settled for \$45m.

Professional Firms - ***Campbell v. Chadbourne & Parke, 16-cv-06832, USDC, S.D.N.Y 2017***, settled for \$3m.

Not every EPA claim wins. In ***Miller v. City of New York, 15-cv-7563, USDC, S.D.N.Y. 2018***, a female crossing guard claimed a violation of the EPA because she was paid less than the (mostly male) traffic enforcement agents. In dismissing the claim, the court noted the differences in training, job requirements, and responsibilities between traffic enforcement agents and school crossing guards, even though most crossing guards are female. The job and work have to be the same for a case to proceed. In other words, you cannot mix apples and oranges although they are both fruit.

Eight states so far (California, Connecticut, Delaware, Massachusetts, New Jersey, New York, Oregon and Vermont) have enacted legislation to ban employers from asking prospective employees about their prior salary, and to ban employers from using that information even if volunteered by the candidate. The hope is to break the cycle of wage inequality and ensure equal pay for equal work. Such legislation may slowly shrink the wage gap over time and reduce the number of suits being filed. Until then, women still have a long way to go and we will continue to see filings of EPA related suits.

Questions for Underwriters

For each submission:

- ▶ Do you ask whether a company has, or is aware of, any gender wage gap among its employees?
- ▶ Do you ask what the company is doing to rectify any such gender wage gap?
- ▶ Do you check whether/how many Equal Pay Act complaints have been filed against the company?
- ▶ If the company is unable to share its gender wage information, is that a red flag to you?

For your portfolio:

- ▶ How much EPLI coverage do you write in industries known to have outsized gender wage disparities?
- ▶ How much additional premium do you charge for such industries?

Contacts

Cathryn Thom
Claims, VP, D&O/E&O
cthom@transre.com
+1 212 365 2258

Brian Finlay
Treaty Underwriting, SVP, D&O/E&O
bfinlay@transre.com
+1 212 365 2038

David Scott
Fac. Underwriting, SVP, D&O/E&O
dscott@transre.com
+1 212 365 2244

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