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When Is Unequal Pay Okay?

As we all know, the Equal Pay Act requires that employers pay male and female employees equal wages for

performing equal work. Specifically, the Equal Pay Act mandates that, "[n]o employer...shall discriminate...between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1).

For entry level employees, compliance with the provisions of the Equal Pay Act is easy - men and women are

entitled to the same starting salary. However, what happens when two lateral employees, one male and one female, with different salaries at their respective former jobs, are hired to perform the same new job? Does the Equal Pay Act require that these two employees start their new jobs at the same rate of pay? The Seventh Circuit answered this question in October of 2005 in *Wernsing v. Dept. of Human Services, State of Illinois*, 427 F.3d 466 (7th Cir. 2005).

In *Wernsing*, Jenny Wernsing was hired by Illinois' Department of Human Services for a civil service position with a pay range of \$2478 to \$4466, depending on prior experience and years of service. The Department's practice with respect to lateral hires was to give them a salary at least equal to what they had been earning, plus a 10% raise if possible under the pay scale for the new job. Since Wernsing had been earning a monthly salary of \$1925 at her old job, she started at \$2478 with the Department, a raise of almost 30%. The Department contemporaneously hired Charles Bingaman for the same civil service position. Bingaman had a prior salary of \$3399. Consequently, he received a monthly salary of \$3739 to start his new job, a 10% raise. Wernsing sued, alleging that the Department discriminated against her in violation of the Equal Pay Act because it paid Bingaman more than it paid her to perform the same work.

The district court, analyzing the language of the Equal Pay Act, reasoned that the Act forbids differences "on the basis of sex," but specifically exempts any pay differential "based on any factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Since wages at a prior employer are a "factor other than sex," the district court determined that the Department's pay practice did not violate the Act.

Wernsing appealed to the Seventh Circuit, arguing that the Department lacked an acceptable business reason for its pay practice, or, alternatively, that because all pay systems discriminate on the basis of sex, any use of prior pay to set salary must be discriminatory. The Seventh Circuit was not persuaded. The court noted that four other circuits (the 2nd, 6th, 9th and 11th) have held that wages in a former job are a "factor other than sex" only if the employer has an acceptable business reason for setting the employee's starting pay in this fashion. Yet the Seventh Circuit declined to follow these circuits, reasoning instead that the Equal Pay Act only asks whether an employer has "a" reason other than sex upon which it bases its employees' salaries, not whether it has a "good" reason. Similarly, the Seventh Circuit decided that Wernsing had not offered sufficient evidence to prove that the establishments from which the Department recruited its employees used wage scales that discriminated against women, thereby making the Department's wage system discriminatory. Thus, the Seventh Circuit affirmed the district court's decision.



In sum, Seventh Circuit employers currently are free to consider a lateral employee's prior salary when setting his or her new salary, even if it results in employees of the opposite sex performing the same work for different rates of pay. However, this

practice is ripe for review by the United States Supreme Court since the appellate courts are divided over whether an employer must have an acceptable business reason for considering an employee's previous pay.

For more information, please contact Kristi Nelson Foy at 414.271.6560, or knfoy@michaelbest.com.