Equal Pay Act and Pay Equity—Past and Future

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President John F. Kennedy signed the Equal Pay Act of 1963 (EPA) with the hope that this act would draw attention to "the unconscionable practice of paying female employees less wages than male employees for the same job."[1] To that end, the act prohibits payment of different wages to men and women who perform equal work in the same workplace. Yet, more than 50 years since the law's enactment, most commentators agree that the EPA has proven ineffective in eradicating gender-based wage discrimination.

An April 2016 congressional report of the Joint Economic Committee concluded that a full-time working woman earns $10,800 less per year than a man based on median annual earnings. On a percentage basis, this difference means that an average woman earns only 79 percent of what a man earns or less than $4 for every $5 paid to a man. Over a career, these differences can add up to pay gap estimates of $430,000 for white women, as much as $877,000 for African-American women, and a whopping $1,007,000 for Latina women as compared to white men.[2]

Nevertheless, a perfect storm is brewing for great strides to be made in the area of pay equity and for the act to have a resurgence of relevancy.

This article will: (1) summarize the act and the mechanisms for bringing EPA cases as compared to other pay discrimination cases; (2) discuss pay equity developments nationwide, both at the federal and state levels; (3) explain why EPA cases may increase in the near future; and (4) make recommendations for preparing for and defending against pay equity challenges.

Basics of the EPA and Why EPA Litigation May Expand

Basics of the EPA

The EPA, which is part of the Fair Labor Standards Act (FLSA), states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, 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, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[3]

Under the EPA, a would-be plaintiff makes out a prima facie case by showing that (1) the individual received lower wages than an employee of the opposite sex, (2) in the same establishment, (3) under similar working conditions, (4) for substantially equal work in terms of skill, effort, and responsibility. Importantly, the act allows the employer to legally differentiate between male and female employees engaging in equal work if the pay difference is the result of (1) a seniority system, (2) a merit system, (3) a system that "measures earning by quantity or quality of production," or (4) any factor other than sex.

Remedies available to an aggrieved employee for pay discrimination under the EPA include a salary increase, back pay in the amount of the difference between the lower and higher paid comparators, liquidated damages in an amount equal to the back pay, attorney's fees, and court costs. Back pay under the EPA dates back two years from the date of suit or three years if the violation was willful. Additionally, individual liability is possible under the EPA if individuals, such as owners, officers, or supervisors, had the capacity to exercise control over the plaintiff.[4]

Judicial Limits on EPA Success and the Turn to Title VII

Despite its initial fanfare, the EPA's usefulness in addressing most pay disparities has been marginal. Courts have interpreted the act's "equal work" and "establishment" requirements narrowly. At the same time, some courts have allowed the "factor other than sex" defense to justify many explanations for pay differences, including some that are not necessarily job-related.[5]

Based on this inherent difficulty in proving an EPA case, aggrieved plaintiffs often look for other avenues of redress for alleged pay discrimination. Title VII also makes it unlawful to discriminate on the basis of sex in pay and benefits. For that reason, a person with a pay discrimination case under the EPA generally also has a claim under Title VII. Recognizing this overlap, Sen. Wallace F. Bennett proposed an amendment to Title VII (the "Bennett Amendment") to purportedly bring Title VII and the EPA into accord. Title VII's Bennett Amendment states:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].[6]

Although the intent may have been to harmonize the two laws, the U.S. Supreme Court has interpreted the Bennett Amendment to incorporate the EPA's four affirmative defenses, but not to incorporate the EPA's "equal work" requirement.[7] As a result, under Title VII, in contrast to the EPA, comparisons in compensation between different employees can be made under a more relaxed "similarly situated" standard and claims can be supported based on comparator employees in different offices, cities, or even states. These distinctions can prove important in whether a case is won or lost and has led many plaintiffs' attorneys to migrate toward Title VII (and away from the EPA) to litigate gender pay equity claims.

The EPA's Collective Action Tool

In disregarding the EPA, however, many practitioners overlook the act's potentially useful procedural structure for addressing alleged systemic pay discrimination. Because the EPA is aimed at eradicating discrimination, most practitioners, including many employment practitioners, assume that the act is part of or modeled after antidiscrimination laws such as Title VII. The EPA, however, is part of the FLSA. Thus, EPA complainants may go directly to court and are not required to file an Equal Employment Opportunity Commission (EEOC) charge first, although they may. Also, just like the FLSA, EPA complainants have a two-year statute of limitations to file a lawsuit in court, or three years if the violation is willful. Most significantly, under both the FLSA and the EPA, employees have the right to pursue their claims as a "collective action."[8]

Collective Actions vs. Class Actions

It is often advantageous for would-be plaintiffs to pursue their claims as a group. The traditional Rule 23 class action, which applies to Title VII and most other discrimination statutes, can require a long and often expensive process before an adjudicator determines if a class action will be certified. Moreover, the Supreme Court has issued several significant opinions that make it even more difficult to bring successful Rule 23 class actions. Consequently, some traditional employment class action plaintiffs' attorneys have turned their attention to the more lenient FLSA collective action procedure. With the heightened attention to gender pay equity and based on the more lenient standards, we predict an increase in EPA collective actions either by themselves or in combination with a Title VII or state law class action.

Rule 23 Class Actions

Under Title VII, individuals who desire to pursue their claims as a group must use the Rule 23 class action mechanism. In a Rule 23 class action, all members of the class are bound by the judgment unless they affirmatively opt out of the class. On first blush, the inclusive nature of class actions sounds appealing. But the road to securing a Rule 23 class certification is often long and arduous. Class action certifications require courts to conduct a "rigorous analysis" to determine whether a class has met the requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to showing numerosity, commonality, typicality, and adequacy (or representativeness), the individuals seeking class certification must also show: (1) the presence of an actual class and (2) that the representative parties are members of that class. For a class to be certified where individualized monetary damages are sought, the class must also meet the requirements of Rule 23(b)(3). Rule 23(b)(3) tests whether common questions of fact or law predominate over individual issues facing the individual class members and whether class treatment is a superior device for adjudicating over other means of resolving the controversy.[9]

Rule 23 class actions are seemingly advantageous to plaintiffs in that they result in large classes due to low opt-out rates. However, both sides expend significant resources to get to the class certification stage, and recent U.S. Supreme Court decisions emphasize that plaintiffs must meet a high burden in order to have a class certified. In *Wal-Mart Stores Inc. v. Dukes*, for example, the Supreme Court

heightened the standard that must be met to prove commonality in a Rule 23(b) class action. The class in *Dukes* included 1.5 million female employees alleging sex discrimination in pay and promotions and seeking injunctive and declaratory relief, punitive damages, and back pay. Both a district court and the Ninth Circuit certified the class, but the Supreme Court held, 5 to 4 with Justice Antonin Scalia penning the opinion, that certification was not proper. The Court stated: "Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters … is just the opposite of a uniform employment practice that would provide the commonality needed for a class action."[10] Since *Dukes*, plaintiffs have struggled to meet the higher burden imposed on a Rule 23 class, especially where the proposed class is large.

Comcast Corp. v. Behrend, another 5-4 Justice Scalia opinion, further increased the difficulty for plaintiffs seeking Rule 23(b)(3) damages to prevail at class certification. *Comcast* held that the damage model advanced by the putative class must show damages that are attributable to the wrong on which the class is being certified and that are capable of measurement on a class basis. Importantly, the Supreme Court rejected the argument that the class certification analysis should not involve an inquiry into the merits of a claim. Instead, the Court made clear that the class certification analysis "will frequently entail" an overlapping analysis of the case merits.[11]

Section 16(b) Collective Actions

As Rule 23 class certifications become more and more onerous, some plaintiffs' class action attorneys are turning to the much more lenient collective action standard, most notably through FLSA collective actions challenging payment of wages. Because the EPA also incorporates the collective action mechanism, the act provides similar advantages for redressing alleged pay discrimination.

In a collective action, the named plaintiffs bring suit on behalf of themselves and others similarly situated. Collective actions are certified in a two-step process. The most important part of this process is generally the first "conditional certification" or "notice" stage. During this first stage, which generally occurs early in the case proceedings, the court determines whether the would-be plaintiffs—the putative class members—are similarly situated under a "fairly lenient standard." The Supreme Court has stated: "Whatever significance 'conditional certification' may have … it is not tantamount to class certification under Rule 23."[12] If conditional certification is granted, the plaintiff is authorized to send opt-in notices to prospective class members. Then, other would-be plaintiffs join the lawsuit by affirmatively filing an "opt-in" notice. Although the certification is "conditional," once the notices are sent and the class members opt-in, discovery proceeds on a collective or class basis.

Much later, at the decertification stage, a higher burden is applied because "the court [now] has much more information on which to base its decision, and makes a factual determination on the similarly situated question."[13] Prior to a decertification motion, however, most of the case-related discovery, time, and expense have been expended. Consequently, whereas litigants often wait until after the certification ruling to engage in settlement discussions in a Rule 23 class, because the members of a conditionally certified class are known early in the litigation and because the discovery process is often expensive, most collective action cases are resolved prior to the parties ever reaching the decertification stage. Thus, the collective action procedure often provides plaintiffs an opportunity to get class recoveries before spending the resources inherent in a Rule 23 class.

Pay Equity's Re-Emergence to Relevance

As attention to pay equity has generally increased, the likelihood of greater utilization of the EPA has similarly grown. President Barack Obama made efforts to address gender pay equity a hallmark of his administration. In fact, the very first piece of legislation newly elected President Obama signed in January 2009 was the Lilly Ledbetter Fair Pay Act (LLFPA). At the time, much of the country was up in arms because the Supreme Court had ruled that Lilly Ledbetter's Title VII claim challenging pay discrimination was time-barred because she filed her claim too long after the discriminatory pay decisions, even though the discrimination at issue was ongoing and each paycheck was yet another manifestation of the discriminatory decisions.[14] The subsequently passed LLFPA amended the Civil Rights Act of 1964 to provide that each paycheck that resulted from a discriminatory decision was a separate violation regardless of when the discrimination began.[15]

In June 2016, the Obama administration broadcast its new White House Equal Pay Pledge. Employers who signed the pledge—more than 100 during the Obama administration—"committ[ed] to conducting an annual companywide gender pay analysis across occupations" and "reviewing hiring and promotion processes and procedures to reduce unconscious bias and structural barriers."[16] In September 2016, the Obama administration attempted to further pay transparency by requiring businesses with 100 or more employees to disclose pay data on Employer Information Reports (the EEO-1) submitted by March 31, 2018. According to Thomas E. Perez, then U.S. secretary of labor: "Collecting data is a critical step in delivering on the promise of equal pay.… Better data will not only help enforcement agencies do their work, but it helps employers to evaluate their own pay practices to prevent pay discrimination in their workplaces."[17] Although the fate of the new EEO-1 requirements is uncertain in light of President Donald Trump's direction that agencies rethink regulations, as well as the appointment of Victoria Lipnic (who voted against the new EEO-1 requirements) to chair the EEOC, the discourse regarding the possible changes furthers attention to pay disparities and pay data.

The EEOC also confirmed its prioritization of equal pay, including enforcement of equal pay laws as one of its six enforcement priorities in the 2013-2016 Strategic Enforcement Plan and the continuation of the equal pay priority in the 2017-2021 Strategic Enforcement Plan.[18] Consistent with this prioritization, as discussed in more detail below, the EEOC also started to bring more and more lawsuits specifically aimed at gender pay equity.

The government's pay equity focus is not singular; many private sector companies have joined the pay equity chorus. In March 2016, Salesforce's CEO Marc Benioff announced that Salesforce had undergone an internal pay analysis and that it spent $3 million in 2015 to close the company's gender pay gap. Benioff encouraged other CEOs to follow suit, stating "with just the push of one button, every CEO in the world can know exactly what is their pay discrepancy between men and women, and I hope that every CEO pushes that button."[19] At the same time, activist investors such as Arjuna Capital, Pax World Management, and Trillium Asset Management applied pressure to technology companies to influence these companies to pay attention to diversity and equal pay issues. For its part, Arjuna Capital submitted shareholder proposals to companies such as eBay,

Intel, Adobe, Apple, Expedia, Microsoft, and Facebook calling for pay equity reports to be published and policy changes to be enacted to reduce the gender pay gap.

Meanwhile, given the lack of progress in passing additional federal legislation, state lawmakers have decided to make progress on the state level, and several states have passed their own versions of pay equity legislation. California, often ahead of the pack, passed the California Fair Pay Act in 2015, which strengthened California's EPA. California then swiftly amended the California Fair Pay Act in 2016 in two ways: (1) by making the requirement for equal pay for substantially similar work apply on the basis of race and ethnicity in addition to gender; and (2) by amending the Labor Code to emphasize that "prior salary shall not, by itself, justify any disparity in compensation."[20]

New York, Maryland, and Massachusetts each passed their own version of pay equity legislation. New York's law, effective Jan. 19, 2016, prevents employers from restricting employees from talking about wages with other employees; it also replaces the "any other factor other than sex" defense with "a bona fide factor other than sex, such as education, training, or experience."[21] Maryland's law, effective Oct. 1, 2016, allows employees to more freely discuss wages, extends the law's protections to differentials that are based on gender identity as well as sex, expands the types of discriminatory actions that are covered, and deems employees working "at the same establishment" to include all workplaces for that employer that are "located in the same county."[22] Massachusetts' law, effective July 1, 2018, in addition to allowing employees to more freely discuss wages, also prohibits employers from asking about salary history before extending a formal job offer to an applicant.[23] New York City, the District of Columbia, and New Jersey, among other locations, have also considered additional pay equity legislation or regulation. Consequently, employers not only have to abide by the federal EPA, but there is also an ever-expanding body of state laws for employers to navigate.

Pay Equity Cases, Including Collective Actions, Will Likely Increase

The combination of the focus on pay equity in the media, the government's revised EEO-1 report mandating collection of pay data, the lenient collective action certification standard, and the emergence of state pay equity laws is a perfect storm for EPA cases to increase.

The EEOC Is Already Bringing More Pay Discrimination Cases

Consistent with its Strategic Enforcement Plan, the EEOC has initiated an increasing number of EPA cases against employers. In *EEOC v. Spec Formliners Inc.*, brought under both the EPA and Title VII, for instance, the EEOC alleges that Spec Formliners paid a female sales representative less than a male sales representative in base pay and required the female to sell more to earn the same commission as the male.[24] In *EEOC v. Colorado Seminary d/b/a University of Denver*, the EEOC alleges that the university violated the EPA and Title VII by paying female law professors at Sturm College of Law significantly less than their male counterparts.[25]

Some of the EEOC's recently filed cases have already been resolved, showing the types of recovery and remedies the EEOC seeks. In *EEOC v. Sealed Air Corp. d/b/a Kevothermal LLC*, a consent decree was entered wherein Kevothermal agreed, among other things, to: (1) pay the employee $30,000 in back pay and $30,000 in compensatory damages; (2) issue a letter of apology to the employee; and (3) conduct a review of all positions in its workforce, determine whether there are any pay disparities, and remedy such pay disparities by increasing the lower paid employee's pay and providing the lower paid employee with back pay.[26] Likewise, the Montevideo School District in Minnesota entered into a conciliation agreement with the EEOC after the EEOC sued the school district for allegedly paying a female custodial aid nearly half of what it paid a male custodian, even though their job duties were practically the same. In addition to agreeing to pay the female employee $50,000, reclassify her position, and adjust her pay, the school district also agreed to provide yearly antidiscrimination training to its employees and to submit all allegations of wage discrimination by employees to the EEOC during the three-year term of the agreement.[27]

EEOC Systemic Investigations and EPA Collective Actions Are Also Expected to Increase

Although the EEOC's recent pay discrimination lawsuits generally involve a single plaintiff, the EEOC's investigative resources prioritize pay discrimination, and, if presented with potential systemic wage discrimination that could not be resolved through the administrative process, the EEOC is likely to aggressively pursue the case. If the new EEO-1 reporting requirements remain in effect, they may also lead to more systemic investigations and lawsuits. The EEOC has stated that it will use the summary pay data in the EEO-1 report to assess complaints of discrimination and more effectively focus investigations.[28]

In addition, as pay equity continues to be in the spotlight and as plaintiffs' counsel become more sophisticated in this area, EPA collective actions, coupled with Title VII and state class actions, are also expected to increase. In fact, we are already beginning to see a new wave of such cases. And, if the EEO-1 reporting requirements go into effect in March 2018, plaintiffs will be able to obtain the reported pay information through a Freedom of Information Act request served on the EEOC, which could even further increase allegations of pay discrimination across broader employee groups.[29]

In the recent case of *Smith v. Merck & Co.*, the New Jersey District Court granted the plaintiffs' motions for conditional certification of an EPA collective action class. There, plaintiffs allege that Merck & Co. "systemically paid female sales employees less than similarly situated male sales employees who performed the same job duties and worked under the same conditions." In granting conditional certification and ordering the issuance of notice to putative class members, the court concluded that plaintiffs "met their burden by making a modest factual showing that a nexus exists between the manner in which defendant's alleged policy affected them and the manner in which it affected other employees."[30] Plaintiffs subsequently issued notice and more than 400 current or former employees joined.

In *Scott v. Family Dollar Stores*, plaintiffs allege that their employer, Family Dollar Stores, implemented companywide pay policies that resulted in female managers being paid less than male managers in violation of the EPA and Title VII. The plaintiffs obtained Rule 23(b)(2) and Rule 23(b)(3) class certification, surmounting arguments that *Wal-Mart Stores Inc. v. Dukes* precluded such a class. The court found that the proposed class of "all female store managers employed or previously employed by defendant since 2002" met all of the class action certification requirements.[31]

In early 2016, a California federal court granted final settlement approval in *Wellens v. Daiichi Sankyo Inc.* There, a class of 1,500 former and current female pharmaceutical sales representatives alleged that their male peers were being paid more for the same job

duties in violation of the EPA. After the court granted conditional certification, the employer agreed to an $8.2 million settlement fund, with more than $4.6 million paid to nearly 1,400 class members, $3 million allotted to attorney's fees and costs, and some of the remaining funds aimed at helping the employer change its pay practices.[32]

Practical Tips for Preparing for and Defending Claims

The heightened attention on pay disparity, including both the risk of private litigation and possible EEOC investigations and lawsuits should incentivize employers to take steps to protect themselves.

Conduct a Privileged Audit of Pay Practices and Wages and Document Bona Fide Reasons for Pay Differences

As an initial matter, employers want to make sure their pay data, if uncovered, will not raise red flags. Rather than reacting to information once it is revealed, employers should consider proactively conducting a privileged audit of pay practices, job descriptions, and salaries. An audit led by an attorney is much more likely to be protected by the attorney-client and/or work product privileges. If an employer undertakes to conduct a privileged audit led by an attorney, certain steps should be taken to preserve the privileged nature of the audit, including clear engagement documentation clarifying the need for legal advice, a narrow team of in-house personnel providing needed information to the attorney's team, and consistent marking of all documents involved in the audit as confidential, attorney-client privileged, and/or work product privileged.

What a Pay Equity Audit Entails

A pay equity audit is multifaceted. The audit should, if possible, be both gender- and race/ethnicity-specific so that the employer can understand and address the full range of pay disparities, if any. One aspect of an audit is identification of the various factors influencing compensation at a particular organization. These factors can include location, education, seniority, responsibility, and performance, among others. Such factors will be important later in the statistical analysis. An audit can also include a review of job descriptions, pay practices, performance evaluation processes, and all forms of an employer's remuneration, including wages, bonuses, and other benefits. Another important aspect of an audit is the actual analysis of an employer's pay data by a qualified statistician experienced in conducting pay equity audits. This statistician acts as an agent for the attorney leading the audit. The statistician, under the direction of counsel, conducts the analysis, usually by multiple regression analysis or other proper statistical methods, and evaluates and measures pay differences.

Understanding, Documenting, and Acting on the Results of an Audit

Employers should be prepared for any disparities that are uncovered as a result of the audit from the outset. The cost associated with correcting uncovered disparities can be substantial, so obtaining buy-in from the right decision-maker before an audit is critical.

If an audit reveals wage differences, the reasons behind those differences should be explored; it is axiomatic that not all wage differences equate to systemic discrimination. For example, there could be legitimate differences that justify wage differentials such as differences in skill and experience, differences that result from a seniority or merit system, differences caused by a system linked to quantity of production or performance, and differences resulting from different responsibility, effort, or working condition. If the audit reveals a legitimate basis for pay differentials, these reasons should be well documented.

One cause of pay differences that is often debated is the use of an applicant's prior compensation rate. If, for example, a female employee making $50,000 annually applies for a job and seeks $55,000, an employer is normally not inclined to hire the applicant at a higher salary than requested. This result is generally true even if the employer just hired a male applicant who was making $60,000 annually and has requested $67,500 for the same position. In conducting the audit and documenting legitimate, non-gender (or race) based reasons for any pay differences, employers should understand that the EEOC, some courts, and a growing number of state or local jurisdictions frown on this type of reliance. Indeed, states such as California prohibit employers from relying on prior salary to justify pay differences. If the audit reveals that differences are caused by prior compensation rates, although it may be fiscally irresponsible to immediately right size positions, employers would be wise to put steps in place to increase all compensation to market rates and to ensure that all employees within a particular job category are paid within the same pay range.

Employer Advantages to Conducting a Pay Audit

Despite the possible forced disclosure of data on pay equity, some employers may be leery of opening the pay equity box for fear of what it might reveal. The head-in-the-sand approach, however, is dangerous and employers who proactively look at their data and strive to improve their performance are likely to be viewed more favorably by the government, courts, and juries and to be able to present a more positive public image. Proactive self-evaluations could also have some legal benefit. In Massachusetts, for example, conducting a good-faith, self-audit is not just a wise thing to do; if an employer conducts a self-evaluation and can demonstrate that "reasonable progress has been made toward[] eliminating compensation differentials based on gender for comparable work," then the employer can utilize an affirmative defense in the event the employer is sued.

Don't Ask for Wage or Salary History Information During the Hiring Process

Commentators in the pay equity arena often argue that asking candidates for wage history information can have the unintended

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consequence of perpetuating wage inequality. The argument is that women (or minorities) continue to be paid less because they were previously paid less, even though their prior wage rate may be the product of pay discrimination. Remember the example of the female candidate who makes less than the male seeking the same position?

For that reason, some commentators and legislatures think that if past salary information is not sought, then employers are more likely to extend employment offers based on the market rate for a particular job. Thus, Massachusetts and Philadelphia have outlawed asking candidates about prior wage or salary and other jurisdictions like New York City are considering similar prohibitions. Employers should seriously consider eliminating wage history as a question generally, and not just in jurisdictions where soliciting this information is prohibited. Employers should also consider not soliciting prior wage information on job applications or related forms.

Train Supervisors and Management

Finally, a company's steps to analyze and redress gender equity will mean little if its stakeholders are not brought into the fold. Individuals with responsibility over recruiting, interviewing, and hiring applicants and those making and communicating compensation and promotion decisions should be adequately trained. Supervisor and management training should include the latest legal developments in the various jurisdictions in which the company operates or has employees. Leaders should be trained to recognize pay disparities and should be made to substantiate their pay decisions.

Conclusion

Equal pay promises to be a rapidly developing area in the near term. Employers and attorneys alike should keep abreast of the potential legislative and regulatory changes and should be prepared to address such changes as they occur. Employers should also work to understand pay differences in their own workforce and, if necessary, to address them. ⊙

Endnotes

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[3]29 U.S.C. § 206(d) (2012).
[4]*See Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987) ("The word 'employer' is defined broadly enough in the Fair Labor Standards Act … to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.").
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