

New York Federal Court Conditionally Certifies \$100 Million Pay Discrimination Collective Action Against Pharmaceutical Company

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A group of female sales representatives alleging sex-based pay discrimination claims against their employer under the federal ***Equal Pay Act*** cleared an initial, but significant, hurdle last week when the Southern District of *New York* granted their motion for conditional certification of a collective action seeking more than \$100 million in damages. The court held the plaintiffs had made the required “modest factual showing” that female sales representatives nationwide who worked for the defendant, Forest Laboratories, Inc., were “similarly situated” and should be permitted to opt-in to the lawsuit.

In [Barrett v. Forest Laboratories, Inc.](#), No. 12-CV-5224 (S.D.N.Y. Sept. 2, 2015), the plaintiffs alleged that male sales representatives at Forest Labs were paid more on average than their female counterparts for performing the same work, even when controlling for experience, performance and other non-discriminatory factors. The employer responded that the vast majority of male sales representatives earned the same or less than their female colleagues and that many of the disparities could be accounted for by the fact that the formula for pay decisions included a subjective component.

In support of their motion for conditional certification, the plaintiffs submitted declarations stating that sales representatives nationwide were similarly situated because they all “operated under the same corporate standards governing skill requirements, training, the type of work that they performed and compensation.” They also submitted an economist’s report identifying a statistically significant difference between the pay of male and female sales representatives when controlling for a series of pertinent variables, such as experience with the company, that purportedly held true to the disadvantage of female employees for the period from 2009 through 2014. Based on this evidence, the court held “the plaintiffs sufficiently demonstrate, at least provisionally, that female Sales Representatives are ‘similarly situated’ for purposes of conditional certification.”

While a grant of conditional certification does not eliminate an employer’s options, it does dramatically increase the costs of litigation and the incentive to consider settling. Consequently, instituting preventative measures, such as periodic audits of wage and hour practices to ensure that variations in compensation among similar positions are based on valid performance and experience metrics and that exempt positions satisfy FLSA salary and duties requirements, is a highly worthwhile

expenditure for employers given the potential consequences. Moreover, when faced with a putative wage and hour collective action, employers should begin thinking strategically immediately and determine whether tools such as a [Rule 68 offer of judgment](#) or aggressively pursuing settlement will ultimately be more cost effective than trying to defeat a motion for conditional certification

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