

## **\$100M Riot Games Deal Hints At Uptick In Pay Bias Suits**

By **Amanda Ottaway**

*Law360 (January 10, 2022, 7:37 PM EST)* -- The prospect of settlements like the \$100 million deal Riot Games recently struck to end a gender discrimination case, as well as the COVID-19 pandemic's impact on the workforce and recent court rulings, may lead to a rise in pay equity suits in 2022, attorneys say.

Though federal pay equity legislation failed in the Senate last summer, courts have given discrimination attorneys new ammunition, and the COVID-19 pandemic has brought changes to the workplace, including an exodus from in-person to remote working arrangements. Those factors have helped create a fertile environment for pay bias claims, according to experts.

"I have every reason to believe that we'll see more, not less, pay equity litigation and claims, and the field is ripe for it," said Crowell & Moring LLP's Trina Fairley Barlow, who represents employers.

Here's a look at what's driving attorneys' anticipation of more pay discrimination battles in 2022.

### **Riot Games, Activision Inspire 'Copycat' Cases**

In late December, video game maker Riot Games Inc. and a California agency asked a Golden State judge to approve a \$100 million settlement in a gender discrimination and sexual harassment suit that called out the company's "men-first" "bro culture."

Orrick Herrington & Sutcliffe LLP's Erin Connell, a San Francisco-based partner who co-chairs that firm's pay equity task force, pointed out that another video game maker, Activision Blizzard, had also been in the headlines in the past year. Activision Blizzard faces similar sex bias allegations encompassing everything from sexual harassment to pay discrimination, and reached an \$18 million deal with the U.S. Equal Employment Opportunity Commission last fall.

"I think in combination, the Riot Games litigation, and certainly now the settlement, alongside the Activision litigation and settlement, have had an impact on the increase in pay equity claims," Connell said.

Connell said she's already seeing what she called "copycat complaints" and demand letters from employees that appear to be based on the Riot Games and Activision cases, both of which made sweeping claims of workplace sex bias.

"The allegations made in those cases were so broad that they encompass just about every type of

discrimination, harassment claim out there," she said. "And so definitely that mold we are seeing replicated."

### **The Pandemic**

The "work-from-home revolution" stemming from the COVID-19 pandemic could spur equal pay disputes, said Rebecca Pontikes, who represents workers with Pontikes Law LLC.

Some surveys have shown that more women than men want to work remotely. If managers favor in-person workers, and more men work in person, that could translate to women missing out on raises, Pontikes said.

The job market is also hot, Connell noted. That means employees may feel they have more leverage to file or join class action suits, or participate in government investigations.

Enforcers are also tuned in to the issue, Connell pointed out.

"The topic of how the pandemic has impacted gender equity is just top of mind, not only for individual employees, but also government agencies," Connell said. She referenced the EEOC and the Office of Federal Contract Compliance Programs, a U.S. Department of Labor subagency that polices bias at employers that do business with the government.

On top of that, some companies have posted record profits during the pandemic, Connell added.

"So I just think sort of all of that combined is having an impact on the increase in clients and cases that we're seeing," she said.

### **New Rulings**

Attorneys pointed to several recent developments in pay bias cases that also changed the legal landscape.

In December, the Fourth Circuit found in *Tracy Sempowich v. Tactile Systems Technology* that the metric for determining sex-based discrimination under the federal Equal Pay Act is pay rate, not total wages, meaning employers are required to pay equally across different types of compensation, like base wages and bonuses.

And in *Jennifer Joy Freyd v. University of Oregon et al.*, the Ninth Circuit ruled in March that a district judge had jumped the gun by concluding that the jobs that a psychology professor and her male peers performed were unique enough that they couldn't be compared for purposes of her federal EPA claim.

"The court cautioned against sort of parsing too narrowly that idea of when work is different or distinguishable. And so that's significant, because obviously being able to demonstrate that, for employers, that the work was not substantially equal is really important," Fairley Barlow said of the Ninth Circuit ruling.

Class certifications in equal pay cases are another huge issue, attorneys said, pointing as an example to the certification of a massive class in May in a pay bias case against Google.

When it comes to group equal pay actions, Golden State law differs from the federal Equal Pay Act, which falls under the Fair Labor Standards Act and therefore has different standards and processes, Orrick's Connell explained.

"The class cases that are proceeding here in California ... under any of the state statutes, really, are very precedent-setting," she said.

--Additional reporting by Max Kutner, Vin Gurrieri, Anne Cullen, Dave Simpson, Daniela Porat and Lauren Berg. Editing by Abbie Sarfo.

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