

Ninth Circuit OKs Pay Structure Based on Prior Salary

On April 27, a panel of the San Francisco-based 9th Circuit Court of Appeals ruled that an employer may justify gender-based pay differentials when it uses salary history alone to set pay. The court found that prior salary may qualify as “a factor other than sex” under the Equal Pay Act if its use is reasonable and serves the employer’s business purposes. Contrary rulings by other federal appeals courts raise the prospect that the Supreme Court ultimately may be asked to resolve the issue. Employers will want to monitor further developments closely.

Background

The federal Equal Pay Act (EPA), which amended the Fair Labor Standards Act of 1938 to prohibit gender-based wage discrimination, generally requires that men and women in the same workplace receive equal pay for equal work. It prohibits employers from paying employees of one sex at a lower rate than opposite-sex employees in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. While the law generally prohibits gender-based pay disparities, it also provides four statutory defenses that allow for pay differentials based on seniority, merit, quantity or quality of production, or “a factor other than sex” (such as education and experience).

California’s Equal Pay Act provides somewhat broader protections, prohibiting unequal pay for men and women performing “substantially similar” work under similar working conditions without the EPA’s “same establishment” limitation. State law requires employers seeking to justify a pay disparity based on a “*bona fide* factor other than sex” to show that it is job-related and consistent with business necessity, and bars them from using prior salary as the sole basis to justify a wage differential. (See our [October 7, 2016](#) *For Your Information*.)

The Equal Pay Claim

After discovering that her male counterparts were being paid more for the same work, a California public school math consultant sued the Fresno County superintendent of schools in his official capacity under the EPA, Title VII and the California Fair Employment and Housing Act. The county conceded that it paid Aileen Rizo less than her male peers, based on an established compensation structure (“Standard Operation Procedure 1440”) that factored in her salary history and education.



Under Standard Operation Procedure 1440, starting salaries for new hires were based on their most recent prior pay. Salaries for new math consultants for the county ranged from \$62,133 to \$81,461, with starting salaries pegged at 105% of their most recent salary. Because adding 5% to Rizo’s prior pay package would have resulted in a starting salary below the County’s minimum, her entry level salary was set at \$62,133 plus a \$600 stipend for her master’s degree, bringing her starting pay to \$62,733 per year — roughly 20% more than she was making at her prior teaching job.

The county moved for summary judgment on Rizo’s equal pay claims, arguing that her salary was based on “a factor other than sex.” The county contended that legitimate, nondiscriminatory business reasons justified its pay history-based approach. It argued that its pay policy was objective, supported recruitment efforts, prevented favoritism, and judiciously spent taxpayer dollars.

The district court denied the county’s motion, ruling that salary history alone can never justify a pay disparity under the EPA, and refused to consider the business reasons the county raised. Even as the court denied the county’s motion for summary judgment, it recognized a potential conflict with 9th Circuit precedent and certified its decision for appeal.

9th Circuit Weighs In

On April 27, a three-judge panel of the appeals court in [Rizo v. Yovino](#) vacated the district court ruling against the county.

The court acknowledged that the EPA does not strictly prohibit using prior salary in setting an employee’s pay, but it also made clear that past pay does not automatically qualify as “a factor other than sex” or justify a compensation disparity under that law. Rather, under established 9th Circuit precedent, salary history may be a valid basis for setting pay if there is a reasonable business reason for its use, regardless of whether there is a gender pay gap. The court sent the case back to the lower court, ordering it to examine the county’s business reasons for the pay differential and to determine whether the use of past salary was reasonable.

Comment. The 9th Circuit did not address differences between the EPA and California law, noting that the parties did not assert any. Although state law now provides that prior salary cannot, by itself, justify pay disparities, that law took effect after the *Rizo* appeal was filed. While California employers may be able to rely on prior pay alone to defend against EPA claims, their pay decisions may be at risk under state law.

Appellate Courts Are Split

As the 9th Circuit acknowledged, decisions by both the 10th and 11th Circuit Courts of Appeals agree with the district court’s ruling that prior salary alone cannot justify a pay disparity under the EPA. In an [amicus brief](#) filed in *Rizo*, the EEOC contended that the EPA “does not permit employers to base pay decisions solely on applicants’ most recent prior salary.” While acknowledging that employers may take prior salary into account in setting an employee’s pay, the agency asserted that it must be considered along with other factors.

State and Local Focus on Pay Equity

Last year, Massachusetts enacted the country’s first statewide ban on pay history inquiries, effectively preventing employers from using salary information to screen applicants or formulate job offers. (See our [August 3, 2016 FYI Alert](#).) Since then, major cities including New York and Philadelphia have enacted similar measures, and other jurisdictions are considering them. (See our [April 12, 2017](#) and [April 28, 2017 FYI](#) publications.) None of these laws have taken effect, and Philadelphia’s is on hold pending a legal challenge. Employers should monitor developments closely and update their hiring practices as needed.

By contrast, the 8th Circuit has held that employers may rely exclusively on prior salary to justify pay disparities, as long as the prior pay level was not the product of sex discrimination or stereotyping. The 7th Circuit has ruled that prior pay can be a defense to an EPA claim, and no further business justification is needed.

In Closing

California employers that rely on prior pay to set new hires' starting salaries should review their pay practices in light of the 9th Circuit's ruling, and monitor further developments at the lower court level.

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