

Reversing Course: 9th Circuit Holds Prior Salary Cannot Justify Pay Differentials

Last year, a three-judge 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, as long as its use is reasonable and serves the employer’s business purposes. Last month, the full court held that prior salary history cannot be used alone or in combination with other factors to justify a gender gap. Employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington that rely in any way on prior pay in setting salaries should re-examine their practices in light of the 9th Circuit’s ruling.

Background

The federal Equal Pay Act (EPA) generally requires that men and women who work in the same establishment and perform substantially equal work receive equal pay. The EPA prohibits gender-based pay differentials unless they are 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, requiring equal pay for men and women who perform substantially similar work under similar working conditions regardless of whether they work in the “same establishment.” Last year, California barred employers from using prior salary as the sole basis for a wage differential, and now requires employers seeking to justify a pay gap based on a “*bona fide* factor other than sex” to show that it is job-related and consistent with business necessity. (See our [October 7, 2016 For Your Information.](#))

Rizo v. Yovino

Aileen Rizo was hired by Fresno County as a public school math consultant in 2009. In accordance with the county’s established compensation structure (Standard Operation Procedure 1440), her starting salary was set at 105% of her prior salary, and she was placed on the corresponding step of the county salary schedule. When Rizo discovered that her male counterparts were being paid more for the



same work, she sued the Fresno County superintendent of schools in his official capacity for violating the EPA, Title VII and the California Fair Employment and Housing Act.

In 2015, the county moved for summary judgment. While conceding that it paid Rizo less than her male peers, the county maintained her pay level was based on a permissible factor other than sex — her prior salary history. The district court disagreed, ruling that salary history alone can never justify a pay disparity under the EPA. Recognizing the potential conflict with 9th Circuit precedent, the court certified its decision for appeal to the 9th Circuit.

9th Circuit Weighs In – Again

Last year, a three-judge panel of the appeals court [vacated](#) the district court ruling. While acknowledging that the EPA does not strictly prohibit using prior salary in setting an employee’s pay, the panel made clear that past pay does not automatically qualify as “a factor other than sex” or justify a compensation disparity.

Relying on 9th Circuit precedent, it sent the case back to the lower court to determine whether the county’s business reason for setting Rizo’s starting salary based on prior salary alone was reasonable.

(See our [May 12, 2017](#) *For Your Information*.)

The 9th Circuit agreed to rehear the case *en banc* to clarify the law.

Last month, the court issued an [opinion](#) overruling prior precedent.

Affirming the district court’s denial of summary judgment on a claim under the EPA, the court held that prior salary alone — or in combination with other factors — cannot justify a wage differential between male and female employees.

The 9th Circuit’s broad ruling that prior salary can never be “a factor other than sex” in a pay system conflicts with decisions in sister circuits. Those circuits are split on whether, or to what extent, the EPA prohibits employers from considering salary history in formulating pay packages. For example, rulings in the 7th and 8th Circuits have held that employers that base wage differentials on salary history would not face liability for violating the EPA. Opinions in the 10th and 11th Circuits would allow employers to consider prior salary in combination with other non-discriminatory factors, but not rely on salary history alone. Similarly, the EEOC, the agency charged with enforcing the EPA, has taken the position that prior pay may be a component of a pay system and considered in a mix of factors unless it reflects sex-based pay discrimination.

In Closing

The 9th Circuit Court has now reversed course, ruling that prior salary history — whether by itself or in combination with other factors — can no longer be used to justify a gender pay gap. In addition to California employers, the ruling impacts employers in eight other states — Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Employers in those locations that rely in any way on prior pay in setting salaries should re-examine their practices in light of the 9th Circuit’s ruling.

Race- and Ethnicity-Based Differentials

California’s Wage Equality Act of 2016 (SB 1063) imposed broader equal pay obligations on California employers by extending the state’s statutory protections against gender-based pay discrimination to wage disparities based on race or ethnicity, starting in 2017. California employers should ensure that their pay practices and compliance strategies have been updated as needed to satisfy those obligations as well. (See our [October 7, 2016](#) *FYI*.)

Authors

Nancy Vary, JD

Abe Dubin, JD

Produced by the Knowledge Resource Center of Conduent Human Resource Services

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@conduent.com.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.