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## Supreme Court Vacates Equal Pay Ruling

On February 25, the U.S. Supreme Court vacated a precedent-changing decision by the 9th Circuit Court of Appeals that prior salary history cannot be used alone — or in combination with other factors — to justify a gender pay gap under the federal Equal Pay Act. The Court ruled that the 9th Circuit erred by counting as a member of the majority the vote of a judge who died before the decision was filed. Pending further proceedings, employers face continued uncertainty about the extent to which they may rely on prior salary in setting pay.

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### 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, but recognizes that gender-based pay differentials are not unlawful in certain circumstances. The EPA permits differentials when they are based on seniority, merit, quantity or quality of production, or “a factor other than sex” (such as education and experience).

In *Rizo v. Yovino*, a California federal district court considered whether an employer may rely on salary history to set starting pay under the EPA. After discovering that male counterparts were being paid more for the same work, Rizo — a California public school math consultant — sued her employer for violating the EPA, Title VII and the California Fair Employment and Housing Act. The employer defended against the equal pay claim, maintaining that the pay differential was based on a permissible factor other than sex — Rizo’s prior salary history — and was justified by legitimate, nondiscriminatory business reasons. The district court ruled that salary history alone can never justify a pay disparity under the EPA, and refused to consider the business reasons that had been raised.

A three-judge panel of the 9th Circuit vacated the ruling on appeal. The panel concluded 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. (See our [May 12, 2017 For Your Information](#).) On rehearing *en banc*, the 9th Circuit disagreed. Finding that salary history is

not a permissible “factor other than sex” under the EPA, a majority of the court held that prior salary alone — or in combination with other factors — cannot justify a wage differential between male and female employees. The opinion, written by Judge Stephen Reinhardt, effectively barred employers from using prior salary or salary history in setting pay in California and eight other states. (See our [May 9, 2018 For Your Information.](#)) The employer appealed, seeking review by the Supreme Court.

## Supreme Court weighs in

On appeal, the employer argued that the 9th Circuit’s ruling relied in error on Judge Reinhardt’s vote and should be set aside. Even though the judge died on March 29, 2018, the 9th Circuit counted his vote in subsequently decided cases, including *Rizo v. Yovino*. While the *Rizo* decision had been written before his death, it was issued 11 days after his death. By counting Judge Reinhardt’s vote as a member of the majority, the appeals court accepted his rationale and deemed it to be the majority opinion that set a precedent for federal courts in the 9th Circuit to follow. Without Judge Reinhardt’s vote, the opinion lacked majority support as it would have been approved by only 5 of the 10 other members of the panel.

In a *per curiam* [opinion](#) issued on February 25, the Supreme Court agreed that the 9th Circuit had erred. Explaining that “federal judges are appointed for life, not for eternity,” the Court held that a federal court may not count the vote of a judge who dies before the decision is issued. Here, the Court concluded, the 9th Circuit erred by effectively allowing Judge Reinhardt “to exercise the judicial power of the United States after his death.” On this technicality alone, the Court vacated the 9th Circuit’s ruling and sent the case back to the 9th Circuit for further proceedings.

Notably, the Court did not rule on the merits of using prior salary or salary history as a permissible “factor other than sex” to justify pay differentials under the EPA. Thus, employers will have to see whether the appeals court issues an opinion on remand that adopts the same rationale as the one that was just overturned on technical grounds.

## In closing

The Supreme Court’s ruling creates continued uncertainty for employers in the nine western states covered by the 9th Circuit about whether they can rely in any way on prior salary in setting pay. Employers should follow the case on remand, and see what guidance the court will provide.

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