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One more time – 9th Circuit rules salary history cannot justify pay gap

For the second time in two years, the San Francisco-based 9th Circuit Court of Appeals ruled that an employer cannot use prior salary history — alone or in combination with other factors — to justify a wage differential between male and female employees under the Equal Pay Act. Employers with operations in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington that rely in any way on prior salaries in setting pay should re-examine their practices in light of this ruling.

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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 under similar working conditions receive equal pay. It prohibits gender-based pay disparities unless they are based on seniority, merit, quantity or quality of production, or “a factor other than sex” (such as education and experience).

Equal pay claim

A public school math consultant’s starting salary was set in 2009 at 105% of her prior salary in accordance with Fresno County’s pay structure. She later learned that male peers were being paid more and sued the county for violating the EPA, among other laws. In 2015, the county moved for summary judgment arguing that the pay differentials were based on a permissible factor other than sex — prior salary. The district court disagreed but certified its decision for appeal to the 9th Circuit.

Appeals panel vacates ruling

In 2017, a three-judge panel of the appeals court reversed the district court. Acknowledging that the EPA does not strictly prohibit the use of prior salary in setting an employee’s pay, the panel also made clear that past pay does not automatically qualify as “a factor other than sex” or justify a compensation disparity. Relying on Circuit precedent, the court held that an employer could justify a wage differential based on prior salary or other gender-neutral factor if using it accomplishes a

business purpose and is reasonable “in light of the employer’s stated purposes as well as its other practices.” The case was sent back to the lower court to determine whether the county’s reliance on prior salary alone was reasonable. (See our [May 12, 2017 FYI](#).)

Buck comment. The 9th Circuit did not address differences between the EPA and California law. However, after the *Rizo* appeal was filed, a new state [law](#) took effect providing that prior salary cannot, by itself, justify pay disparities. A subsequent state [law](#) restricted employers from requesting or relying on salary history information.

Appeals court rehears case

The 9th Circuit agreed to rehear the case *en banc* to clarify the law. In 2018, the court [held](#) that prior pay is not a “factor other than sex” upon which a wage differential may be based. Rather, “any other factor other than sex” is limited to legitimate, job-related factors such as experience, educational background, ability, or prior job performance.

Finding that prior pay is not a permissible “factor other than sex” within the meaning of the EPA, the court concluded that it cannot alone — or in combination with other factors — justify a wage differential between male and female employees for equal work. (See our [May 9, 2018 FYI](#).) Because the opinion relied on the vote of a judge who died before it was issued, the U.S. Supreme Court vacated it and remanded the case to the 9th Circuit.

And reconsiders on remand

On February 27, 2020, the 9th Circuit again considered whether an employer can justify a wage differential between male and female employees by relying on prior salary. Reaching the same conclusion as it had in 2018, the court again [held](#) that salary history is not “a factor other than sex.” In reaching that conclusion, the court found that only job-related factors may justify gender-based wage differentials under the EPA, and prior pay does not qualify as a job-related factor.

Buck comment. Circuit courts are split on whether, or to what extent, the EPA allows employers to use salary history to justify pay disparities. Both the 10th and 11th Circuits hold that employers cannot rely solely on prior salary, while the 7th and 8th Circuits hold that reliance on prior pay does not by itself violate the EPA. Employers may face potentially conflicting obligations as a number of state and local laws prohibit employers from seeking and/or relying on salary history in setting starting pay.

In closing

The 9th Circuit Court has once more ruled that prior salary history — whether by itself or in combination with other factors — cannot be used to justify a gender pay gap under the EPA. Employers with operations in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington that rely in any way on prior pay in setting salaries should re-examine their practices in light of this ruling and applicable state or local law.

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