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PERSPECTIVE

## After equal pay ruling, employers should review practices

By Gary M. McLaughlin and Galit A. Knotz

On April 9, the 9th U.S. Circuit Court of Appeals ruled en banc that employers cannot rely on an applicant's prior salary — either alone or in combination with other factors—to justify a wage disparity between male and female employees under the Equal Pay Act. *Rizo v. Yovino*, 2018 DJDAR. While other circuits have ruled that prior salary alone may not be considered, none have ruled that salary cannot be considered at all in defense of Equal Pay Act claims.

The federal Equal Pay Act provides, in relevant part, that an employer may not discriminate on the basis of sex “by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. Section 206(d) (1) (emphasis added).

The plaintiff in *Rizo* was hired by the Fresno County Office of Education as a math consultant. The county determined her salary using its formal procedures, whereby salary was set by adding 5 percent to the employee's prior salary. After learning that her male colleagues earned a higher salary, the plaintiff brought a claim under the Equal Pay Act.

The county moved for summary judgment, arguing that the plaintiff's prior salary justified the wage differential as a “factor other than sex.” The district court denied summary judgment, reasoning that the county's salary-setting procedures necessarily conflict with the act. A three-judge panel of the 9th Circuit vacated the denial and remanded. That panel concluded that the court's prior ruling in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), permitted reliance on prior salary

alone as a “factor other than sex” so long as it “was reasonable and effectuated some business purpose.”

In August 2017, the court decided to rehear the case en banc.

The 9th Circuit's en banc decision affirmed the district court's denial of summary judgment and overruled *Kouba*. The court held that the catchall “factor other than sex” in the Equal Pay Act is “limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance ... Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act which allows employers to pay disparate wages.” In reaching its decision, the court considered the context and legislative history of the Equal Pay Act and concluded that employers “perpetuate [the] wage differentials” that the act was meant to curb by relying on prior wages when setting a woman's salary.

The *Rizo* court qualified its opinion in two notable respects. First, it noted that its ruling did not address the question of whether and in what circumstances prior salary may play a role in individualized salary negotiations. Second, the court clarified that “job-related” was not synonymous with “business-related” because while the catchall exception “applies to a wide variety of job-related factors, it does not encompass reasons that are simply good for business.”

California employers should be aware that California's own Equal Pay Act already precludes reliance on prior salary history to justify wage disparities. See Cal. Labor Code Section 1197.5. That law includes the same four exceptions to pay differentials as its federal counterpart, and an amendment effective in 2016 strengthened its protections by, among other things, mandating that employers who rely on the “factor other than sex” exception demonstrate that any sex-based differential in compensation is job related and consistent with a business necessity. A further amendment expressly provides that “[p]rior salary shall not,

by itself” justify wage disparities, and a new California law effective Jan. 1, 2018, prohibits employers from asking about or considering prior salary history information when making compensation or hiring decisions. An exception to the new law allows employers to consider salary information disclosed by the applicant “voluntarily and without prompting.” *Id.* at Section 432.3.

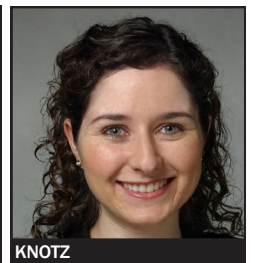
Under *Rizo*, employers in the entire 9th Circuit now face a higher bar in justifying wage disparities between their male and female employees, and should review their compensation and recruitment practices carefully to ensure compliance with both federal and state equal pay laws. An audit of wage rates may be helpful to determine whether any wage disparities exist, and to root out any disparities that cannot be justified by legitimate job-related factors.

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