

## Labor & Employment Alert

April 12, 2018

### Key Points

- The 9th Circuit has ruled that employers may not rely on prior salary, alone or in combination with other factors, to justify wage disparities under the Equal Pay Act.
- The 9th Circuit ruling does not address whether and in what circumstances prior salary may play a role in individualized salary negotiations.
- The 9th Circuit's ruling brings federal law closer in line with California state law, which as of January 1, 2018, expressly provides that prior salary does not justify disparities and prohibits employers from asking about prior salary information.



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### 9th Circuit Rules That Employers Cannot Rely on Applicant's Prior Salary to Justify Wage Disparities under the Equal Pay Act

On April 9, 2018, the 9th Circuit ruled *en banc* in *Rizo v. Yovino*, Case No. 16-15372, that employers may not consider prior salary alone or in combination with other factors to justify a wage differentiation between male and female employees under the Equal Pay Act. While other circuits have ruled that prior salary **alone** may not be considered, none have ruled that salary cannot be considered **at all**, and the issue appears ripe for an appeal to the Supreme Court.

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. §206(d)(1) (emphasis added).

The plaintiff in *Rizo* was hired by the Fresno County of Education as a math consultant. The County determined her salary using its formal salary setting procedures, whereby salary was set by adding five percent to the employee's prior salary. After learning that her male colleagues earned a higher salary, the plaintiff brought claims under the Equal Protection 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, *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), was controlling and permitted prior salary alone to constitute a "factor other than sex" as long as use of that factor "was reasonable and effectuated some business purpose."

This week's *en banc* decision affirmed the district court's denial of summary judgment and overturned *Kouba*. The court held that the catchall "factor other than sex" in the Equal Protection 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 Protection 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 further qualified its opinion in two notable respects. First, it noted that its ruling was not addressing 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. That law includes the same four exceptions to pay differentials as its federal counterpart, and an October 2016 amendment 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 effective January 1, 2018, expressly states that "prior salary, by itself" does not justify wage disparities, and further prohibits employers from asking about or considering prior salary history information when making compensation or hiring decisions. An exception allows employers to consider salary information disclosed by the applicant "voluntarily and without prompting."

In short, employers in California and the rest of the 9th Circuit 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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