

## Publications

### **Labor and Employment Alert: Ninth Circuit Holds That Prior Salary Cannot Justify Unequal Pay**

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#### **CLIENT ALERT | 4.11.2018**

On April 9, 2018, the Ninth Circuit Court of Appeals held that prior salary, either alone or in combination with other factors, cannot justify a wage differential between male and female employees. In *Rizo v. Yovino*, the full 11-judge panel of the Court unanimously held that an employee's prior salary does not constitute a "factor other than sex" upon which pay differences may be based under the federal Equal Pay Act (EPA). The Court concluded that a "factor other than sex" is limited to legitimate, job-related factors like experience, educational background, ability, or prior job performance.

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education. Her salary was determined in accordance with the county's salary schedule, which dictated that a new hire's salary was determined by taking his or her prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. Prior experience was not used in setting the initial salary. Rizo later learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. Rizo sued for discrimination under the EPA.

Under the EPA, employers are prohibited from discriminating in compensation between employees on the basis of sex for equal work on jobs requiring equal skill, effort, and responsibility, and are performed under similar working conditions. A wage differential is allowed when it results from a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or a differential based on any other factor other than sex.

The county did not dispute that Rizo was paid less for the same work than comparable male employees. Instead, it argued that the wage differential was lawful under the EPA, which permits differentials that are based on "any other factor than sex." The county contended that using an employee's prior salary to set her initial starting salary was a factor other than sex. The Ninth Circuit disagreed. In a strongly worded opinion, the Court said that "allowing an employer to justify a wage differential between men and women on the basis of prior salary is

wholly inconsistent with the provisions of the Equal Pay Act.”

Based on the text, history and purpose of the EPA, “the answer is clear” that an employer cannot justify a wage differential between male and female employees by relying on prior salary. The Court explained that the EPA “stands for a principle as simple as it is just: men and women should receive equal pay for equal work regardless of sex.” Recognizing its earlier case law had been ambiguous on this issue, the Court used *Rizo* to make clear “prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.”

Accordingly, the “any other factor other than sex” catchall provision in the EPA is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance. To allow otherwise “would be to perpetuate rather than eliminate the pervasive discrimination at which the [EPA] was aimed.” When the EPA was enacted, “an employee’s prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other.” So “Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.”

At least in the Ninth Circuit, employers are now prohibited from relying on prior salary alone or in combination to justify sex-based wage differentials under the federal EPA. The Court left open for “future panels” of the Court to determine “whether or under what circumstances past salary may play a role in the course of individualized salary negotiations.” But given the tenor of the Court’s opinion, employers may find it difficult to rely on these individualized negotiations to justify a salary differential.

Note that California has its own Equal Pay Act, which differs from the federal EPA. Under the California EPA, employers are prohibited from justifying sex-, race-, or ethnicity-based pay differences **solely** on the basis of an employee’s prior salary. California also prohibits an employer from paying its employees less than what it pays employees of the opposite sex or of another race or ethnicity for “substantially similar work.” It is also worth noting that New Jersey recently enacted a [sweeping equal pay law](#), which further highlights the issues employers face when operating across multiple jurisdictions. Contact your Vorys lawyer if you have questions about equal pay laws and their effect on your business operations.