

Insights: Alerts

Ninth Circuit Rules That Prior Salary Cannot Justify Gender Pay Differentials Under the Equal Pay Act

April 11, 2018

Written by **Diane L. Prucino, Randall D. Avram, Susan W. Pangborn** and **Noelle A. Abastillas**

On April 9, 2018, the U.S. Court of Appeals for the Ninth Circuit ruled in *Rizo v. Yovino* that an employer cannot use an employee's prior salary to justify a wage disparity between male and female employees under the federal Equal Pay Act. The Ninth Circuit's decision broadens the split among federal judicial circuits on whether an employer may consider an employee's compensation history in making pay decisions. For now, employers in the states that make up the Ninth Circuit—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—should refrain from making pay decisions based on an employee's prior salary.

The Ninth Circuit's Decision in *Rizo v. Yovino*

The Equal Pay Act ("EPA") was enacted in 1963 to address wage disparities based on sex. To establish a claim under the EPA, an employee must show that her employer paid male and female employees in the same workplace different wages for equal work on jobs requiring equal skill, effort, and responsibility performed under similar working conditions. Once an employee demonstrates that her employer paid male and female employees different wages for equal work, the employee wins, unless her employer can justify the wage disparity by showing that it was made pursuant to one of four statutory exceptions: 1) a seniority system; 2) a merit system; 3) a system that measures earnings by quantity or quality of production; or 4) a differential based on any factor other than sex. Employers traditionally have relied on the catchall "any factor other than sex" exception to defend pay decisions based on factors that do not fall within the first three exceptions, such as training, education, ability, experience, and prior salary.

The lawsuit in *Rizo v. Yovino* involved a female math consultant hired by a county office of education. The county set her initial pay using a formula that took into account her salary at her previous job and assigned her to the corresponding step of the county's salary schedule. Three years later, when the female math consultant learned that her male colleagues were hired at higher salary steps, she filed suit against the county under the EPA. The county defended against the EPA claim on the basis that her prior salary justified the pay differential under the "factor other than sex" exception.

Writing for the majority of the 11-judge panel, Judge Stephen Reinhardt rejected the county's defense. Judge Reinhardt explained that relying on an employee's previous salary "merely perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate." Judge Reinhardt wrote that "any factor other than sex"



is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." Judge Reinhart concluded that consideration of an employee's prior salary does not fall within the "any factor other than sex" exception, and therefore, employers cannot consider prior salary, whether alone or in connection with other factors, in setting employee pay.

A Divisive Decision

The *Rizo* decision exposes deep divisions within the Ninth Circuit as well as among the federal appellate courts. Five of the 11 Ninth Circuit judges disagreed with the majority's conclusion that prior salary can never be considered under the "any factor other than sex" exception. As many as four judges commented that prior salary could properly be considered contemporaneously with other factors such as education, past performance, and training.

The disagreement on whether an employee's prior salary can be considered in making pay decisions also is apparent among the federal appellate courts. At the other extreme, the Seventh Circuit Court of Appeals (which encompasses the states of Wisconsin, Illinois, and Indiana) has held that prior salary by itself may qualify as a "factor other than sex" that justifies a pay disparity between male and female employees. In the middle, the Eleventh Circuit Court of Appeals (which encompasses the states of Alabama, Florida, and Georgia), the Tenth Circuit Court of Appeals (which encompasses the states of Colorado, Kansas, New Mexico, Oklahoma, Wyoming, and Utah), and the Eighth Circuit Court of Appeals (which encompasses the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) have held that prior salary may be considered in conjunction with other factors such as education, experience, and training.

All of this creates a veritable landmine for companies with workforces spanning multiple states.

Practical Implications

Following the *Rizo* decision, employers who hire employees in the states comprising the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) should not consider a new hire's prior salary when making pay decisions. Employers in other appellate circuits also should be wary of relying too heavily on an employee's prior salary in making pay decisions given the growing recognition that an employee's prior pay could have been the result of persistent sex-based wage disparities.

It appears likely that the U.S. Supreme Court will eventually resolve the split among the circuits on this issue. Until such time, employers should shift their focus to job-related factors that are less likely to be directly linked to wage discrimination when making pay decisions, such as experience, educational background, training, or prior job performance.

In the aftermath of *Rizo*, documentation of the reasons for pay decisions becomes even more important. Documentation showing legitimate, job-related reasons for pay decisions may provide convincing evidence that a pay decision was not based on sex, whereas a supervisor's handwritten notation of an applicant's prior salary

on a job application or résumé could be used against the employer in an Equal Pay Act lawsuit. Employers in the Ninth Circuit should remove questions about salary history from employment application forms and should refrain from asking such questions during job interviews. Employers in all states should take a critical look at their current pay policies and determine whether documentation supporting pay decisions is maintained and readily accessible in the event of wage discrimination litigation.

Related People



Diane L. Prucino

Partner
Atlanta, GA
t 404.815.6479
dprucino@kilpatricktownsend.com



Randall D. Avram

Partner
Raleigh, NC
t 919.420.1812
ravram@kilpatricktownsend.com



Susan W. Pangborn

Partner
San Francisco, CA
t 415.273.4763
spangborn@kilpatricktownsend.com



Noelle A. Abastillas

Senior Labor & Employment Attorney
Atlanta, GA
t 404.815.6056
nabastillas@kilpatricktownsend.com