

AN OLD-SCHOOL APPROACH TO EQUAL PAY AT 9TH CIRC.

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The 9th Circuit issued a decision in late April holding that an employer does not violate the federal Equal Pay Act by paying men and women differently for the same work where their starting pay was determined by their salaries in their previous jobs. The court applied a decades-old precedent in reaching its decision, one that is likely to have little impact on private sector employers in California but that might be helpful to employers elsewhere in the circuit.

The 9th Circuit's Decision

In *Rizo v. Yovino* (854 F.3d 1161 (9th Cir. 2017)), a female math consultant for the Fresno County public schools was paid at the lowest of 10 salary steps for her position when she was hired because her salary in her previous job was less than the lowest salary step. She later learned that a male math consultant for the school system was hired at the second-highest of the 10 salary steps, and that in fact all of the male math consultants in the school district were paid more than her. She sued, and the county moved for summary judgment on the defense under the Equal Pay Act that a pay differential may be justified on "any other factor other than sex." Under the equal pay law, pay differentials are not unlawful if they are shown to be based on a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or a differential based on any factor other than sex. The county argued that the math consultants' pay differential was not the result of sex but rather the result of setting starting salaries based on prior salary.

The U.S. district court denied the county's motion for

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summary judgment. It determined that prior salary alone can never qualify as a factor other than sex because “a pay structure based exclusively on prior wages is so inherently fraught with the risk ... that it will perpetuate a discriminatory wage disparity between men and women ... even if motivated by a legitimate business purpose.”

The 9th Circuit reversed. It applied a 1982 precedent that held that prior salary can be a factor other than sex that justifies a current salary difference, provided the employer shows that relying on prior salary effectuates some business policy and the employer uses prior salary reasonably in light of its stated purpose as well as its other practices. In other words, prior salary can be used to set starting salary where it makes good business sense and is not unreasonable. The court found no reason not to apply that precedent, and it ordered the case back to the lower court to determine whether the standard set in the earlier case had been met.

Limited Impact on California Employers

The Rizo case is of limited use to California employers because California has its own equal pay statute that was substantially revised effective Jan. 1, 2016. California’s law was changed in several respects to make it more employee-friendly. For example, a plaintiff need only show that jobs subject to comparison are “substantially similar” and not the same, and comparisons may be made across the entire company instead of across only a single establishment.

More specifically, AB 1676, enacted last year and effective Jan. 1, 2017, amended California’s law to state: “Prior salary shall not, by itself, justify any disparity in compensation.” Notably, the preamble to this new statute cited the lower court’s decision in Rizo that the 9th Circuit reversed. The stated reason for the new law was that historically women tend to be paid less than men and allowing employers to base starting salaries on prior pay only perpetuates wage discrimination. In any event, on account of this statute, private sector employers in California may not set starting salaries solely on the basis of the employee’s prior salary. For the time being, this option is still available to public sector employers, which are not covered by the state’s equal pay law, but this may soon change.

California Has More Legislation on the Horizon

There is legislation (AB 46) currently in the California legislature that would make the state's equal pay laws applicable to public sector employers. If this legislation becomes law, the Rizo case will have no effect in California.

There is also a bill in the legislature (AB 168) that would prohibit an employer from asking job applicants for their salary history. This bill also would require an employer, upon reasonable request, to provide the pay scale for a position to an applicant for employment. Previous attempts to enact such legislation have not been successful, but that has not prevented legislators from trying yet again.

Pay Equity Litigation Likely the Next New Thing

Almost all states have an equal pay statute, and New York, Maryland and Massachusetts recently have joined California in liberalizing their laws. As a result, an increase in pay equity lawsuits is likely to occur soon, as employer liability under these broadened laws accrues.

In the meantime, employers should conduct self-audits to determine whether wage differentials exist among employees performing the same or similar work and whether they can be defended. Note that California's law applies to pay differentials based on race and ethnicity as well as sex. If differentials are found that cannot be defended they must be remedied without decreasing the pay of any employee. Such an audit should be conducted with the assistance and at the direction of legal counsel so that the results may be protected by the attorney-client privilege.

Employers also must set compensation based more on objective than subjective criteria, both for new employees and with respect to wage increases for current employees. Purely discretionary raises and bonuses may be difficult to defend if they lead to substantial pay differentials between men and women. Once a tentative pay rate is set for a job, moreover, use caution in deciding whether to pay less — or more — than that rate. Variances will not necessarily be illegal but the justification for them should be articulated in advance with the assistance of legal counsel.

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