# Appeals Court Says Salary History Can't Block Equal Pay Act Claims

9TH CIRCUIT RULING GIVES BOOST TO PAY EQUITY CLAIMS

Insights
4.09.18

In a landmark decision that will accelerate the growing pay equity movement, especially for employers on the west coast, the 9th Circuit Court of Appeals today became the latest federal court of appeals to rule that employers cannot justify a wage differential between men and women by relying on prior salary. By tightening the language contained in the Equal Pay Act, the 9th Circuit has just made it more difficult for employers to justify pay differentials and defend pay equity claims. This is a wake-up call for all employers to ensure their compensation structures do not unfairly limit the amount of money women earn at their organizations.

**Employee Finds She Is Paid Less Than Others Solely Because Of Her Salary History**
The facts of the case are fairly straightforward. Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in 2009. The county's Standard Operating Procedure for determining salary dictated that new employees would be given a 5% raise from whatever their salaries had been at their previous job and then placed into a structured salary schedule. Rizo was earning a little over $50,000 at her previous post in Arizona before joining Fresno County, so she was slotted into the appropriate step as dictated solely by that previous salary. The county did not take prior experience or any other factor into account when setting Rizo's salary.

A few years later, Rizo learned that male colleagues subsequently hired in similar roles had been placed into higher salary steps—assumedly because their salaries at previous employers had been higher than her previous salary. An internal complaint did not resolve the matter to her satisfaction, so she filed an Equal Pay Act (EPA) claim against the county in 2014. Although she received a favorable ruling from a lower federal court which would have allowed her case to proceed to trial, a three-judge panel of the 9th Circuit Court of Appeals initially reversed that decision in 2017 and ruled in the county's favor. Because this matter was deemed sufficiently significant, however, the 9th Circuit agreed to hear the matter *en banc*—meaning a full complement of 11 judges would rule on the matter. Their decision would set controlling law for all employers in the 9th Circuit's jurisdiction, which includes those in California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho, and Montana.

**The Crucial Question**

The county admitted that male colleagues earned more than Rizo for substantially equal work. However, it argued that the wage differential was permitted by the EPA because of the following statutory section:

No employer…shall discriminate…between employees on the basis of sex by paying wages to employees in such establishment 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***.

The county argued that this this catchall exception should include an employee's prior salary because it is a "factor other than sex."

**Court Creates New Standard For Justifying Wage Differentials**

Today's *en banc* panel decision roundly and emphatically rejected this argument. The tightly written 30-page majority opinion held that "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."

The court looked to the language of the EPA, the legislative history of the statute, and its underlying purpose in creating a new standard. Rather than permitting a broad reading of the catchall provision, the court stated that the "any-other-factor-other-than-sex" defense should only be limited to legitimate, job-related factors such as "**a prospective employee's experience, educational background, ability, or prior job performance**." As the court said in applying this standard to the case at hand, prior salary—whether considered alone or with other factors—is not job related and thus does not fall within the statute's exception.

The 9th Circuit noted that it is not alone in limiting the EPA's catchall provision to job-related factors. It cited to cases from the 2nd Circuit (covering federal claims arising in New York, Connecticut, and Vermont), 6th Circuit (Ohio, Kentucky, Tennessee, and Michigan), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), and 11th Circuit (Florida, Georgia, and Alabama) all as interpreting the "factor-other-than-sex" exception in a similar manner. However, each of these cases carries with them subtle nuances that may lead to differing conclusions on a case-by-case basis, and perhaps none provide such a definitive and clear-cut ruling as the 9th Circuit did today.

The court also noted that at least two circuits have shied away from issuing such a broad pronouncement—the 7th Circuit (which oversees federal courts in Illinois, Indiana, and Wisconsin) and 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota). This means that there continues to exist a possible split in the circuits, which could lead to eventual Supreme Court intervention.

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**To Ask Or Not To Ask: That Is The Question**

In light of this decision, employers across the west coast must now determine whether they should eliminate questions about salary history during the application process and during compensation finalization. While California and Oregon both have state laws barring employers from making such inquiries and using past salary history to establish compensation, what should employers in other states do?

On the one hand, the court said that its ruling did not specifically bar employers from all such practices. "We do not decide," it said, "whether or under what circumstances past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions relating to individualized negotiations for decision in subsequent cases."

However, the scope of today's decision means that setting compensation based in whole or in part on salary history is fraught with danger in any jurisdiction governed by 9th Circuit precedent. After all, the court has established a very broad interpretation of the EPA, along with a very narrow reading of a primary defense to legal claims, meaning that you are more susceptible than ever to pay equity claims.

**Conclusion: What Should Employers Do?**

Today's ruling provides yet another reminder that you need to take the specter of pay equity claims seriously, taking immediate steps to address potential trouble spots. You should begin by working with your counsel to conduct a privileged pay audit to determine if you have compensation gaps. If any are identified, you should work with your counsel to ascertain whether any are justifiable—perhaps because of differences in experience, education, ability, job performance, seniority, quality of work, quantity, or another merit-based factor. Even in those states that have enacted salary inquiry bans, liability from past inquiries may be lingering. In some states, undertaking such an internal audit and then acting to remedy the situation will create a safe harbor shielding you from pay equity claims or damages.

You might also consider eliminating questions relating to salary history from your interview protocol and job applications. Instead, many employers now request an applicant's salary expectations at this stage in the process as a way to help negotiate a fair salary. You will also need to inform third-party reference check businesses operating at your command, and your hiring managers conducting job interviews, about any changes in your practice.

For more information about how this legislation could affect your workplace, contact any attorney in our Pay Equity Practice Group or your regular Fisher Phillips attorney.

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