Employers Can't Use Pay History To Escape Equal Pay Claims, Says 9th Circuit

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Employers are not permitted to justify disparity in pay based on prior pay history, the 9th Circuit Court of Appeals just ruled, eliminating a defense to pay equity claims for businesses across the west coast. Although the Equal Pay Act (EPA) contains a catch-all provision allowing employers to defend pay differentials caused by "any other factor other than sex," an *en banc* panel concluded in the February 27 ruling in *Rizo v. Yovino* that prior salary history does not fit into that exception. Employers in the 9th Circuit now have certainty when it comes to understanding the contours of the federal equal pay statute and need to adjust their business practices accordingly.

Employee Paid Less Than Others Solely Because Of Salary History

The facts of the case are 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 factors 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 EPA claim against the county in 2014.

Although she received a favorable ruling from a lower federal court that would have allowed her case to proceed to trial, a three-judge panel of the 9th Circuit Court of Appeals reversed that decision in 2017 and ruled in the county's favor. Because this matter was deemed sufficiently significant, however, the 9th Circuit heard the matter *en banc*—meaning a full complement of 11 judges ruled on the matter, setting controlling law for all employers in its jurisdiction (which includes those in California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho, and Montana).

What Does "Other Than Sex" Mean?

In 2018, the 9th Circuit's *en banc* panel made history by becoming the first federal appeals court to so explicitly reject the employer's contention that salary history could serve as a legitimate

justification for a pay disparity under the EPA. While other circuit courts had already reached similar conclusions, none had done so in such a clear-cut and explicit manner. The employer had relied on the catchall provision of the statute that reads:

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***.

Because salary history is, technically, a factor "other than sex," the employer argued that it should be permitted to use it to justify any disparity. The *en banc* panel rejected the employer's argument, ruling 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."

But in 2019, the Supreme Court scrapped the ruling on a technicality. One of the 9th Circuit judges listed in the majority of the *en banc* ruling died 11 days before the case was issued and therefore invalidated the decision. The Supreme Court sent the matter back down to the circuit court to take another crack at the case, and the 9th Circuit obliged and came to the same conclusion it had in 2018.

Final Say From Appeals Court

The court once again reiterated that only job-related criteria fall under the EPA's catch-all defense. The court noted that the kinds of circumstances it would permit to be considered include shift differentials, the time of day when work is performed, and other similar legitimate distinctions. But prior pay isn't job-related for purposes of an EPA claim because it pertains to the salary the employee was paid at a different job, the court said, meaning it could not be used to justify paying a worker of one sex less than workers of the opposite sex for equal work.

"The express purpose of the EPA was to eradicate the practice of paying women less simply because they are women," the court concluded. "Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate."

What Should Employers Do?

The 9th Circuit was not the first appeals court to limit the EPA's catchall provision to job-related factors as 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) have all

Oklahoma, Utah, and Wyoming), and 11th Circuit (Florida, Georgia, and Alabama) have all interpreted the "factor-other-than-sex" exception in a similar manner. However, each of these cases carried with them subtle nuances that may lead to differing conclusions on a case-by-case basis, and none provided such a definitive and clear-cut ruling as the 9th Circuit's *en banc* decision.

It's worth noting 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 split in the circuits, which could lead to eventual Supreme Court intervention — this time on the merits of the case.

To Ask Or Not To Ask: That Is The Question

In light of this patchwork of varying standards, employers across the country — and especially those with operations spanning several of the jurisdictions described above — must determine whether they should eliminate questions about salary history during the application process and during compensation finalization. While several states and local areas have passed laws barring employers from making such inquiries and using past salary history to establish compensation, what should employers in other states do?

At this point, setting compensation based in whole or in part on salary history is fraught with danger in many jurisdictions around the nation. If you haven't been taking things seriously yet, you need to consider the specter of a pay equity claim a definitive risk and take 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 job-related 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.

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Pay Equity Practice Group.

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