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Salary History Cannot Justify Unequal Pay Between Men and Women, According to Ninth Circuit

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The Ninth Circuit Court of Appeals ruled this week that an employer cannot justify a pay difference between male and female employees performing equal work based on prior salary. *Rizo v. Yovino*. This is a significant decision that could increase potential liability for Equal Pay Act (EPA) claims for employers with workers in states covered by the Ninth Circuit, namely California, Nevada, Idaho, Montana, Arizona, Oregon, Washington, Alaska, and Hawaii.

Equal Pay Act Requirements

The EPA was enacted in 1963, amending the Fair Labor Standards Act, to prohibit wage disparities based on sex. In short, it requires that men and women be paid equal pay for equal work regardless of sex. Specifically, the law provides that no employer shall discriminate on the basis of sex in paying wages for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Exceptions are permitted when wages are made pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or a differential based on any other factor other than sex.

Employer's Pay Policy Added Five Percent to New Hires' Prior Salary

In the case before the court, Aileen Rizo was hired as a math consultant by the Fresno County Office of Education. Her salary was set according to the County's Standard Operating Procedure under which a new hire would be paid five percent over his or her prior salary, and placed on a corresponding step of the County's ten-step salary schedule. Based on Rizo's prior salary in Arizona, she was placed at step 1 of level 1 on the County's hiring schedule.

A few years into her employment, Rizo was having lunch with her colleagues and learned that her male counterparts had been subsequently hired as math consultants at higher salary steps. Rizo filed a pay disparity complaint with the County which replied that her pay was set in accordance with its Standard Operating Procedure. Rizo filed a federal lawsuit alleging a violation of the EPA, sex discrimination under Title VII, and related state law claims.

Prior Pay Not A “Factor Other Than Sex”

The County did not dispute that it paid Rizo less than comparable male employees for the same work. Instead, it argued that considering each employee's prior salary to set wages was a permissible “factor other than sex,” so any resulting wage differential was not in violation of the EPA.

The Ninth Circuit ruled that an employer was not permitted to consider an employee's prior salary, either by itself or in combination with other factors, when establishing the employee's wages. The Court specifically stated that “prior salary alone or in combination with other factors cannot justify a wage differential” because prior salary history does not constitute a “factor other than sex” under the EPA's statutory “catchall” exception. The Court wrote that prior salary is not a legitimate measure of work experience, ability, performance, or any other job-related quality, and that employers must look directly to those underlying factors rather than prior salary when justifying a wage differential between male and female employees doing equal work. Writing for the majority, Judge Reinhardt stated, “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.”

Defining “Factors Other Than Sex”

The Court concluded that “any other 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. To assert that affirmative defense, employers must provide evidence to show not simply that the employer's proffered reasons *could* explain the wage difference between the sexes, but that the proffered reasons *do in fact* explain the wage disparity. There is no requirement that a plaintiff prove discriminatory intent on the employer's part.

Oddly, however, while stating that it was deciding a general rule, the Court went on to write that it was not attempting to resolve all applications of the rule under all circumstances, including whether or under what circumstances past salary may play a part in the individual negotiation of an employee's salary. The Court deferred questions regarding the role of prior salary in individualized salary negotiations to subsequent cases. That language in the opinion creates uncertainty about how, when, and in what way an employer may use a new hire's past salary when setting the individual's starting salary.

What Employers Should Do Now

In light of this significant decision, employers with employees in the states covered by the Ninth Circuit should take steps now to minimize potential EPA liability by reviewing their hiring pay practices to ensure that prior compensation history is not a consideration for setting an employee's starting salary. In states where questions about compensation history are not already prohibited by state law (e.g., California already prohibits such inquiries), employers should consider whether they wish to maintain such

questions on their application forms. While the questions may serve a non-discriminatory purpose unrelated to setting wages (e.g., evidence of career advancement, inquiry into what industry competitors pay their employees, etc.), they may also be used to argue that employers impermissibly sought the information to make wage-setting decisions.

If you have any questions about this ruling or any wage and hour issues, please contact me at DLane@hollandhart.com or contact the Holland & Hart attorney with whom you typically work.

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