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Ninth Circuit: Employers May Not Consider Salary History in Deciding to Pay Men and Woman Differently

The day before Equal Pay Day, the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, ruled that employers defending claims under the Equal Pay Act cannot rely on workers' past salaries in any respect in trying to justify pay disparities between women and men. *Aileen Rizo v. Jim Yovino,* 16-15372, 2018 WL 1702982 (9th Cir. Apr. 9, 2018) (en banc). This ruling expressly overturns the Ninth Circuit's prior holding in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), conflicts with rulings from other circuits, and tees up a very important issue for potential Supreme Court review.

By way of explanation, the Equal Pay Act generally forbids employers from paying men and women differently for the same work, but the Act includes four exceptions under which employers can pay workers at different rates: (1) seniority, (2) merit, (3) the quantity or quality of the employee's work, or (4) "any other factor other than sex." 29 U.S.C. § 206(d)(1). For much of the past 40 years, employers have argued (often successfully) that they may consider an applicant's prior salary history in setting a starting salary because it is a "factor other than sex." In *Rizo*, the Ninth Circuit rejected this argument, laying clear that past salary history is not a "factor other than sex" within the meaning of the Equal Pay Act. Rather, a "factor other than sex" must be "job-related" and not one that affects a "business policy." Having reached that conclusion via statutory construction, the Ninth Circuit's ruling that an employer may not rely, in whole or in part, on an individual's prior salary as justification for setting initial wages that perpetuate a gender-based wage gap flows naturally.

Rizo stems from a lawsuit brought by Aileen Rizo, a math consultant, against the Superintendent of the Fresno County Office of Education (the County). Rizo initiated the lawsuit after discovering that the County paid her less than her male colleagues. She alleged the County violated the Equal Pay Act through its standard operating procedure, which required paying new hires slightly more than they earned at their previous job.

At the close of discovery, the County moved for summary judgment. It conceded that it paid Ms. Rizo less than her male counterparts for the same work. But, it argued that the wage differential did not violate the Equal Pay Act because it was attributable to men having higher salaries before coming to work for the County—an alleged "factor other than sex."

The district court denied summary judgment, agreeing with Ms. Rizo that prior salary did not constitute a "factor other than sex" under the Equal Pay Act. It certified for interlocutory appeal, however, the legal question of whether the Equal Pay Act permits an employer to rely on prior salary alone when setting an employee's starting salary.

A three-judge panel of the Ninth Circuit vacated the district court's order denying the County's motion for summary judgment, and remanded for further proceedings based on *Kouba v. Allstate Insurance Co*. In August 2017, however, the Ninth Circuit granted Ms. Rizo's petition for rehearing en banc "to clarify the law, including the vitality and effect of *Kouba*." *Rizo*, 2018 WL 1702982, at *4.

The *en banc* decision affirms the district court's denial of summary judgment and expressly overrules *Kouba*. It concludes, "unhesitatingly," that the Equal Pay Act's reference to "any other factor other than sex" encompasses only "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." *Rizo*, 2018 WL 1702982, at *5. The *Rizo* court reasoned that Congress enacted the Equal Pay Act "to eliminate long-existing 'endemic' sex-based wage disparities," and that it is thus "inconceivable" that Congress would permit employers to base new hires' salaries on those very entrenched disparities it meant to eliminate. *Id.*

With this about-face, the Ninth Circuit joins the Fifth, Tenth, and Eleventh Circuits in holding that the Equal Pay Act precludes employers from relying solely on an employee's prior pay when setting a starting salary. The Seventh and Eighth Circuits, by contrast, have held that reliance on the use of prior salary history does not, by itself, violate the Equal Pay Act. *Compare Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001) (rejecting use of prior pay as defense to Equal Pay Act claim where use of prior pay appeared pretextual and was easily rebutted); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (Equal Pay Act "precludes an employer from relying solely upon a prior salary to justify pay disparity") (quoting *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. 2003) (unpublished)); and *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995) ("We have consistently held that 'prior salary alone cannot justify pay disparity' under the EPA.") (quoting *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 & n.9 (11th Cir. 1988)); *with Wernsing v. Dept. of Human Services, State of Illinois*, 427 F.3d 466, 471 (7th Cir. 2005) (relying on differences in prior salary, absent any evidence of discrimination, is permitted); *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003) ("we believe a case-by case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense.").

Note, however, that notwithstanding the opinion's emphatic language, the Ninth Circuit, in a somewhat contradictory fashion, makes clear that its ruling does not purport to decide whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation. Nor does it bar employer consideration of prior pay history in setting initial pay rates where the employer can "point directly to the underlying [job-related] factors for which prior salary is a rough proxy." Thus, although this opinion is certain to emit a shock wave, its precise meaning and scope, by its own terms, will be left to future courts to discern.

In light of this opinion, expect a spate of new charges and lawsuits under the Equal Pay Act. In addition, expect growth in the number of equal pay claims filed by employees, potentially outpaced only by the number of third parties selling equal pay audit and compliance services. The number of states and municipalities enacting laws that limit employers' ability to ask prospective employees about their pay histories also will likely continue to grow. Effective Jan. 1, 2018, California joined Oregon, Massachusetts, and Delaware in regulating whether and when employers can inquire about pay history. Cities across the country, including Philadelphia and New York City, have similar rules. More will follow.

Moving forward, employers should proceed with caution. Policies and practices around the inquiry into and use of prospective employees' pay history should be given careful consideration. Given the uncertainty around whether the law permits employers to rely on pay history to justify wage differentials, and the myriad state and local laws that limit employers in even inquiring about pay history during the application and salary negotiation process, employers should continue monitoring new laws in the cities and states in which they operate to ensure that they remain in compliance with evolving restrictions on the use of pay history. If you are already involved in litigation, fine tuning the defense may be necessary to accommodate this rapidly changing area of the law.

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