Legal Update Article

Prior Pay No Defense to Pay Difference Under Equal Pay Act, Ninth Circuit Reaffirms

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Prior pay, alone or in combination with other factors, is not a job-related "factor other than sex" that can be used to justify a difference in pay under the Equal Pay Act (EPA), a majority of judges on the U.S. Court of Appeals for the Ninth Circuit has held again. ***Rizo v. Yovino***, No. 16-15372 (Feb. 27, 2020).

The Court previously reached this conclusion in 2018. On appeal to the U.S. Supreme Court, the Supreme Court remanded the case because the authoring judge (Judge Stephen Reinhardt) passed away before publication of the opinion.

The new majority decision, authored by Judge Morgan Christen, reiterates, "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." Accordingly, the Court held, "[A]n employee's prior pay cannot serve as an affirmative defense to a *prima facie* showing of an EPA violation."

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Background

The Fresno County Office of Education paid the plaintiff, Aileen Rizo, less than comparable male employees for the same work. The County set starting pay based on a pay scale that expressly took into account prior salary.

Rizo sued for violation of the EPA, among other claims. The County defended the EPA claim on the basis of the "catch-all" affirmative defense in the EPA providing, in pertinent part, that wage differentials are permissible if "based on any factor other than sex." The district court denied summary judgment to the County.

A three-judge panel of the Ninth Circuit reversed the district court decision, holding that using prior salary to calculate current wages can be permissible under the EPA as a "factor other than sex" if the company establishes the use was reasonable and effectuated a business policy.

Ninth Circuit Decision

On remand from the Supreme Court, the *en banc* court again reversed the panel decision. The Ninth Circuit court rejected the argument that the "factor other than sex" exception in the EPA allows any factor that is "not sex itself to serve as an affirmative defense." Instead, the Court concluded that the defense "comprised only job-related factors." The Court further held that "prior pay—pay received for a different job—is necessarily *not*" a job-related factor. (Emphasis added.)

The Court noted that Congress was motivated to enact the EPA to respond to the "legacy of sex discrimination" in America's workforce. It stated:

> We do not presume that any particular employee's prior wages were depressed as a result of sex discrimination. But the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage differences.

The Court expressed concerns that the wage gap has "narrowed," but not "closed" since the enactment of the EPA. It stated, "The wage gap persists across nearly all occupations and industries, regardless of education, experience, or job title."

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The latest Ninth Circuit decision follows a string of new state and local regulations banning the use of prior salary or salary history in setting pay. For more, see our Pay Equity Advisor Blog.

For assistance with compliance with federal and state pay discrimination laws, please contact a Jackson Lewis attorney or our Pay Equity Group.