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CLIENT ALERT

Ninth Circuit Rules that Prior Salary Cannot Justify Wage Differential

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Employers cannot avoid liability under the Equal Pay Act (EPA) for established pay gaps between men and women by relying upon salary history to prove the differential is based upon a "factor other than sex" according to the U.S. Court of Appeals for the Ninth Circuit. *Aileen Rizo v. Jim Yovino*, No. 16-15372 (9th Cir. 4/9/2018). In reversing its own precedent, the court held that prior salary—alone or in combination with other factors—cannot justify a wage differential between male and female employees.

Plaintiff Aileen Rizo, a California math consultant, learned that she earned less than her male colleagues because of Fresno County Superintendent of Schools' practice of paying new hires slightly more than they earned at their last job. Rizo filed suit in federal court alleging that the district's system carried illegal pay gaps forward in violation of the EPA, which prohibits paying men and women unequal wages for substantially similar work.

Once Rizo met her burden of establishing a pay gap, the burden shifted to Fresno County to prove that the differential nevertheless was lawful because it was based on seniority, merit, the quantity or quality of the employee's work, or "any other factor other than sex." Fresno County relied upon Ninth Circuit precedent, including the court's earlier panel decision in April 2017, arguing that salary history was a "factor other than sex" that accounted for and justified the differential.

Judge Stephen Reinhardt wrote the opinion for the en banc court before his death last month. In the opinion, the court rejected Fresno County's argument and its prior precedent stating "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." The court reasoned it "inconceivable" that Congress meant for the "factor other than sex" exception to include salary history given that it enacted the EPA to correct the "serious and endemic problem" of women being paid less than men for the same work. Such an interpretation, according to the court, would allow businesses to justify new gaps based on existing gaps. Fresno County, therefore, failed to set forth an affirmative defense as a matter of law by relying on salary history.

In concurring opinions, Judge M. Margaret McKeown, joined by Judge Mary H. Murguia, wrote that while she agreed with most of the majority opinion, the majority, went too far in holding that any consideration of prior pay is impermissible under the EPA, even when it is assessed with other job-related factors. Also concurring, Judge Consuelo Callahan, joined by Judge Richard Tallman, wrote that in holding that prior salary can never be considered,

the majority failed to follow Supreme Court precedent, unnecessarily ignored "the realities of business," and, might, in practice, hinder rather than promote equal pay for equal work. Finally, Judge Paul Watford wrote, in concurrence, that past pay can constitute a "factor other than sex," but only if an employee's past pay is not itself a reflection of sex discrimination.

We have reported in prior briefings, *California Employment Legislative Update* and *Legislative Trends: Pay Equity & Inquiries*, the trend of states and municipalities enacting legislation to ban employers from asking job applicants about salary history. Each of those laws currently applies at the new hire stage, not to internal company promotions. The Ninth Circuit's decision arguably thrusts the EPA to the forefront of this issue with its pronouncement—in a footnote—that "[b]y failing to address compensation for employees seeking promotions or changes in status within the same organization, we do not imply that the Equal Pay Act is inapplicable to these situations."

Fresno County reportedly intends to appeal the Ninth Circuit's ruling to the U.S. Supreme Court. In light of the existing circuit court split on this issue—the Seventh Circuit, for example, has ruled that salary history is always a "factor other than sex" (see *Wernsing v. Dep't of Human Servs.*, *State of Illinois*, 427 F.3d 466, 468–70 (2005))—the issue may be ripe for Supreme Court consideration. In the meantime, employers in states located within the jurisdiction of the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), as well as those employers in jurisdictions that prohibit employers from inquiring about and/or relying on salary history in setting compensation, should consult with counsel as to whether this factor should be removed from consideration when setting salaries.

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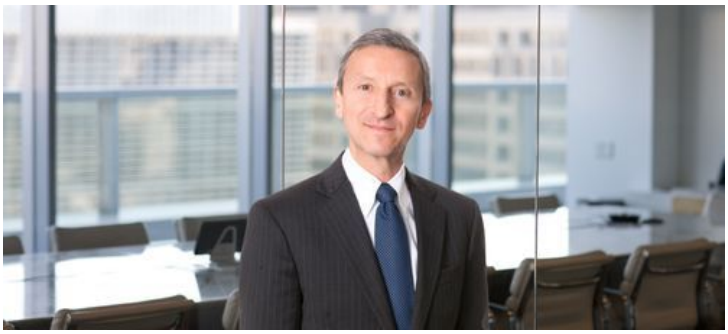

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