

Pay Equity Update: Taking into Account Salary History in Setting Pay

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The Ninth Circuit recently held for the second time in *Rizo v. Yovino* that, under the federal Equal Pay Act (the “EPA”), prior salary history cannot be used by employers to justify sex-based pay differentials.

The EPA prohibits pay discrimination on the basis of sex and does not require proof of discriminatory intent. Specifically, the EPA requires equal pay for equal work that is performed under similar working conditions on jobs that require equal skill, effort and responsibility. The EPA permits unequal pay only if the inequality results from (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. In *Rizo*, the Ninth Circuit held that past salary is not a “factor other than sex” that can justify sex-based pay gaps.

What It Means. Assume a company makes an offer of employment to a candidate for a specific role within the organization. This candidate is a man, and our hypothetical company already has a woman employee in the same role. During pay negotiations, the candidate voluntarily discloses his current salary to the employer, and this self-disclosed salary is higher than what the company currently pays to its woman employee. Under *Rizo*, our hypothetical company would violate the EPA if it pays the male candidate a higher salary than that of the woman employee based in any part on his self-disclosed current salary. However, the company could rely on job-related qualifications to make an unequal pay offer to the male candidate—e.g., past experience, education and relevant certifications, or other job-relevant training, skills and knowledge—but prior salary should not be any part of this determination.

It’s Not Just the Ninth Circuit. While there is a circuit split at the federal level as to whether prior salary can justify sex-based pay gaps under the EPA (whether taken alone or in combination with other considerations), companies should be aware of so-called “salary history bans” at the state and local level, including in New York (and New York City), California (and San Francisco), Colorado, Illinois, Massachusetts, Oregon and Washington. Most of these jurisdictions limit an employer’s ability to rely on an applicant’s salary history in reaching a compensation decision—in many cases, even if

this salary history is voluntarily disclosed by the applicant—or use prior salary information to justify any pay disparity. New York’s equal pay law, which took effect on January 6, 2020, bans employers from using an applicant’s prior salary history to justify a difference in pay between employees in protected classes who perform “substantially similar work,” not just equal work as under the federal EPA. In the above jurisdictions and many other states and localities, asking about or requesting an applicant’s prior salary is strictly prohibited.

How to Determine and Negotiate Pay. There are a variety of job-relevant considerations that can support pay decisions without taking into account salary history.

- **Position-Related Factors.** These include the duties and responsibilities of the position, the pay of current employees in a similar position within the organization, industry data and market factors (including geographic considerations), and the organization’s budget for the position. These considerations can be taken into account to determine a pay range for the position prior to seeking applicants.
- **Person-Related Factors.** For specific candidates, pay decisions can be based on past experience, education levels and relevant certifications, or specific training, skills and knowledge.

When negotiating pay, it is generally permissible to discuss with applicants their expectations for salary and benefits—just keep pay history out of it. Employers can also generally discuss with applicants objective measures of past performance.

Legal and Reputational Risks. The promotion of pay equity and elimination of the pay gap between men and women is part of the current national conversation. Although federal equal pay enforcement seemingly has been de-prioritized under the current administration,¹ states have made pay equity a high priority. Private civil litigation alleging violations of the federal EPA or state or local laws remains both a legal and reputational risk to companies.

For these reasons, companies should consider taking protective steps to prevent equal pay issues, including:

- evaluating current compensation practices to ensure that they comply with applicable federal, state and local equal pay and salary history laws;

¹ The U.S. Equal Employment Opportunity Commission (the “EEOC”) will not collect compensation data for 2019. However, the EEOC may consider a new rulemaking regarding pay data per its fall regulatory agenda.

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- training hiring managers and others involved in the recruiting process on the applicable equal pay and salary history ban laws; and
 - conducting internal pay equity audits to address any pay discrepancies based on sex, race or other protected classes to both get ahead of potential lawsuits and take advantage of safe harbors under certain state and local laws.

If you have any questions or require assistance with compliance with federal and state pay equity laws, please do not hesitate to reach out.



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