IADC COMMITTEE NEWSLETTER

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IN THIS ISSUE

This article discusses the recently-issued Ninth Circuit decision in Rizo v. Yovino addressing inquiries regarding prior salary under the Equal Pay Act and provides advice to employers to exercise caution in hiring practices in this unsettled area of the law.

Inadvertently Perpetuating Wage Discrimination: The Ninth Circuit Finds Employers' Reliance on Salary History Violates the Equal Pay Act

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I. Introduction

A business hiring practice by employers hiring a new worker was once commonly to ask about the candidate's salary history. With this information, the employer gauged the candidate's salary expectations, and prepared and proposed a job offer in line with those expectations. This practice, however, came with a problematic twist: it encouraged an employer to offer a lower starting wage to some job candidates than they would have otherwise. If the candidate's prior salary was the result of wage discrimination, even the most well-intentioned employer could be perpetuating wage discrimination. A recent Ninth Circuit decision held an employer could not rely solely on a female employee's lower prior salary to justify paying her a lower starting wage than the starting wage provided to a similarly situated male employee, and that prior salary was not an acceptable factor to qualify for an exception under the Equal Pay Act.[1]

The Equal Pay Act was enacted in 1963 under a simple principle: Equal Pay for Equal Work. Yet over 50 years later, women continue to earn 20% less than men.[2] The simple principle has proven not so simple to follow, in part due to the multiple factors that account for the wage gap between men and women. Gender expectations, education, training opportunities, and advancement opportunities (to name just a few) all play a role in wage discrepancy.[3]

II. The Ninth Circuit's Holding in *Rizo v. Yovino*

The first step to wage equality is an equal starting wage, which is the issue in *Rizo v. Yovino*.[4] The method for determining a starting salary can be complicated, with each position requiring different education, skills, hours, and experience. To complicate matters further, each person applying for the position is a unique individual with a different work history. In recognition of these complex problems, the Equal Pay Act provides four exceptions to account for varying pay: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex*."[5]

In *Rizo*, an employer (a public school) utilized a system to set its employee's starting salary by taking the candidate's prior salary and adding 5%.[6] The employer argued this system was gender neutral and fell under the fourth exception; the prior salary being a differential based on a "factor other than sex".[7] The Ninth Circuit noted the fourth (catchall) exception was "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance;"[8] and concluded the

[1] *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).
[2] AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7 (2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth.
[3] *Id.* at 14-17.
[4] 887 F.3d 453 (2018).
[5] 29 U.S.C. § 206(d)(1) (emphasis added).
[6] *Rizo*, 887 F.3d at 457.
[7] *Id.* at 458.
[8] *Id.* at 460.

employee's prior salary is not considered a job-related factor.[9] As the Court reasoned, at the time the Equal Pay Act was enacted, the prior salary of a female employee would have been lower than that of a male employee because the work place was discriminatory.[10] If an employer could use prior salary as a basis for offering lower starting salaries to female employees, then the Equal Pay Act, at the very outset of its enactment, would do nothing to remedy the discrimination because the prior salary incorporated the historically discriminatory behavior. An employer cannot follow the "mandate of equal pay for equal work"[11] when relying on a prior salary that has incorporated a history of unequal pay for equal work. Therefore, using prior salary to justify paying a lower wage to one employee than to another perpetuates wage discrimination.[12] The Court held it is impermissible for an employer to rely on prior salary as a factor in setting starting salaries.[13]

It is understandable that a business may be motivated to reduce labor costs by hiring workers at lower salaries. A business may free up resources to be used elsewhere if it hires an employee at less than the business had projected to pay for that position. Even though this practice may make good business sense, according to the Ninth Circuit this business objective does not meet the exception set forth in the Equal Pay Act.[14] The candidate's prior salary may not have been appropriate. The salary could be lower based on a legitimate factor such as performance, or due to a lack of negotiating skills to lobby for a raise, or due to illegal wage discrimination. The relationship between an employee's prior salary and a legitimate, job-related factor is too attenuated to be relied upon by the employer.[15] Pursuant to the Ninth Circuit, although the catchall exception applies to a wide variety of job-related factors, it does not encompass reasons that are simply good for business. [16]

III. The Circuit Split on Prior Salary as a "Factor Other Than Sex"

The Ninth Circuit is not the only Circuit to address whether the use of prior salary falls under the fourth (catchall) exception. These Courts have come to varying conclusions, and the decision in *Rizo* only adds to the different interpretation and analyses among the Circuits. The Seventh and Eighth Circuits have held exactly opposite the Ninth Circuit and permit salary history as a means to determine an employee's starting salary.[17] The Second and Sixth Circuits take an expansive view of the fourth exception, and allow prior history so long as the employer has a legitimate business purpose for relying on the information.[18] The Tenth and Eleventh Circuits allow prior salary to be

[9] *Id.*
[10] *Id.* at 461.
[11] *Id.* at 459.
[12] *Id.* at 468.
[13] *Id.*
[14] *Id.* at 466.
[15] *Id.* at 467.
[16] *Id*.
[17] *Lauderdale v. Illinois Department of Human Services*, 876 F.3d 904 (7th Cir. 2017); *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003).
[18] *Aldrich v. Randolph Cent. Sch. Dist*., 963 F.2d 520 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353 (6th Cir. 2006).

considered so long as it is not the sole factor.[19]

A Petition for Certiori in the *Rizo* matter has been docketed by United States Supreme Court, and may resolve the Circuit split. Even so, many states and localities have enacted legislation that prohibits inquiries regarding prior salary. There are at least 11 state bans and 10 local bans.[20]

IV. Conclusion

With the varying state and local jurisdictional requirements, as well as the Circuit split, employers must proceed with caution, especially employers whose businesses span multiple jurisdictions. Best practice for employers should be to develop starting salaries ranges based on the required qualifications for the position while considering market conditions. During the recruitment process, instead of asking about prior salary, the employer may discuss the salary range expectations for that position. Using this range, the employer should then individualize the starting salary based on the skills, experience, and performance of the employee. These factors, even under the Ninth Circuit's interpretation of the fourth exception, are legitimate, job-related factors that allow a pay disparity between employees. Such an approach allows the employer to appropriately assess salaries and reduce the risk of perpetuating illegal discriminatory practices embedded within a candidate's prior salary.

[19] *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

[20] *Salary History Bans*, HR DIVE (Dec. 19, 2018), https://www.hrdive.com/news/salary-history-ban-states-list/516662/.

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