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The Use of Salary History Still Up in the Air in the Ninth Circuit

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Seyfarth Synopsis: *On technical grounds, the Supreme Court vacated the Ninth Circuit's decision on the use of prior salary to explain pay differences under federal law.*

On February 25, 2019, the Supreme Court issued an unsigned per curiam opinion vacating the Ninth Circuit *en banc* decision holding that prior salary cannot be relied upon to explain a pay differential between a man and woman under the federal Equal Pay Act.

In April 2018, the Ninth Circuit joined the Tenth and Eleventh circuits in holding that the Equal Pay Act precludes employers from relying solely on prior salary to justify pay differences. This was in contrast to decisions in the Seventh and Eighth Circuits, which held that such reliance does not by itself violate the Equal Pay Act.[1] This means that there is no end to the circuit split on this complicated and nuanced area of law.

So what did the Supreme Court hold? Noting that judges are "appointed for life, not for eternity," the Supreme Court vacated the Ninth Circuit opinion because the majority opinion was authored by the late Judge Stephen Reinhardt and not filed until 11 days after his death, and without Judge Reinhardt's vote, the rationale underlying opinion no longer had the majority vote.

Today's Supreme Court ruling, however, is unlikely to resolve this issue for long. Back when the Ninth Circuit decided *Rizo*, the 10 living judges at the time of the opinion's filing all concurred with the ultimate decision that prior salary history could not justify a pay disparity. Upon remand, we are likely to see the same outcome, although perhaps with a different rationale.

So what does this mean for employers in the Ninth Circuit? In some states, not much. There are state laws prohibiting employers from using prior salary as a guidepost in justifying pay differences in California, Hawaii, Oregon, and Washington State. This remains an area that should be approached with caution.

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1 Cf. Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015), quoting Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir.2003) (unpublished) (holding that the Equal Pay Act "precludes an employer from relying solely upon a prior salary to justify pay disparity.") and Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995), quoting Glenn v. General Motors Corp., 841 F.2d 1567, 1571 & n. 9; ("We have consistently held that 'prior salary alone cannot justify pay disparity' under the EPA.") with Wernsing v. Department of Human Servs, 427 F.3d 466, 471 (7th Cir. 2005) (holding that relying on differences in prior salary, absent any evidence of discrimination, is permitted) and 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.")

Seyfarth's Pay Equity Group continues to track these developments closely. Watch for further updates soon, or contact Chantelle C. Egan at cegan@seyfarth.com, or Christine Hendrickson at chendrickson@seyfarth.com.

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