

# One Minute Memo®



## Ninth Circuit Holds that Prior Salary Alone May Justify Pay Differential in Equal Pay Act Cases

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**Seyfarth Synopsis:** On April 27, 2017, the Ninth Circuit held that using prior salary alone may support differences in compensation under the Equal Pay Act as a “factor other than sex” if using prior salary was “reasonable” and “effectuated a business policy.”

The debate over the lawfulness and utility of using prior salary as a guidepost in setting starting compensation for new employees continues. Last Thursday, the U.S. Court of Appeals for the Ninth Circuit held that using prior salary to set starting pay for new hires may support differences in compensation if its use was “reasonable” and “effectuated a business policy” under the federal Equal Pay Act. While using prior salary as a factor for purposes of setting pay may serve legitimate and non-discriminatory business objectives, given the [impending city and state law bans](#) that will forbid or limit an employer’s inquiry into prior salary, the [California Fair Pay Act prohibition on using prior salary as the sole justification for pay differences](#), and split within the federal Circuits on the use of prior salary, we recommend that employers who wish to use prior salary for setting initial compensation carefully consider the full legal landscape.

### The Facts Underlying the Ninth Circuit Case

The case, *Rizo v. Yoviny*<sup>1</sup>, was brought by Aileen Rizo who worked as a math consultant for the Fresno County public schools. The County classified management-level employees in salary levels that contain progressive pay steps. New math consultants were placed into Level 1, which contained ten salary steps with compensation ranging from \$62,133 to \$81,461. To determine the starting salary for a new consultant, the County considered the candidates’ most recent prior salary and added 5% to assign the starting salary step within Level 1.

Rizo previously worked as a middle school math teacher in Arizona. Consistent with the County’s practices, Rizo was to receive a 5% increase over her prior salary. However, doing so would have resulted in a starting salary that was lower than the minimum salary level for new math consultants. The County addressed the issue by setting Rizo’s starting salary at the minimum of the Level 1-Step 1 salary range, along with a slight increase to account for her advanced education.

Several years later, Rizo learned that at least one of her male colleague’s starting salary was set at the Level 1-Step 9 salary range and that the other math consultants, all of whom were male, all earned more than she was paid. After raising internal complaints regarding the disparity between her compensation and that of her male counterparts, Rizo filed suit raising allegations under the federal Equal Pay Act, Title VII, and the California Fair Employment and Housing Act<sup>2</sup>.

<sup>1</sup> No. 16-15372, 2017 WL 1505068 at \*1 (9th Cir. April 27, 2017)

<sup>2</sup> The Ninth Circuit panel explained that they limited their discussion to Rizo’s federal Equal Pay Act claims because Title VII claims alleging that a plaintiff has been denied equal pay for substantially equal work are adjudicated according to Equal Pay Act standards. See *Id.* at n. 2.

## The Trial Court Decision

The County moved for summary judgment, arguing that although Rizo earned less than her male colleagues, the pay differences were not based on her sex, but were instead based on her prior salary --a "factor other than sex." The district court disagreed, holding that, under the Equal Pay Act, prior salary alone can never qualify as a factor other than sex. The district court reasoned that basing one's starting salary exclusively on prior salary carried too great a risk of perpetuating gender-based wage disparities.

## The Court of Appeals' Decision

The Ninth Circuit Court of Appeals reversed and relied on its prior decision in *Kouba v. Allstate Insurance Co.*<sup>3</sup>, which held that an employer can maintain a pay differential based on prior salary (or any other gender-neutral factor) if it shows that the factor effectuates some business policy and if the employer uses the factor "reasonably in light of the employer's stated purpose as well as its other practices." The Ninth Circuit held similar reasoning applied to Title VII claims as well.

The Ninth Circuit rejected the district court's reasoning that, while *Kouba* permitted employers to rely on prior salary under certain circumstances, it did not go as far as permitting prior salary alone as a "factor other than sex" that could support an affirmative defense under the Equal Pay Act. In rejecting the district court's reasoning, the Ninth Circuit concluded that *Kouba* squarely addressed the issue and concluded that "prior salary alone" could justify pay disparities if prior salary was used reasonably and served some business policy.

In response to Rizo's allegations, the County offered four business reasons for using prior salary to set pay: (1) the criterion was objective; (2) the policy encouraged candidates to leave their prior positions for a 5% salary increase; (3) the policy prevented favoritism and ensured consistency in application; and (4) the policy was a judicious use of taxpayer dollars. In light of its prior decision in *Kouba*, the Ninth Circuit vacated and remanded the matter to the district court to consider whether the business justifications proffered by the County were reasonable and served their stated purpose.

## Why is the *Rizo* Decision Important?

The Ninth Circuit's decision in *Rizo* is certainly welcome news for many employers who often turn to prior salary as a picture of the market for a particular role and as a proxy for an applicant's skills, experience, and performance in their prior role. Unfortunately, however, employers must navigate a patchwork of federal, state, and local laws that touch on the use of prior salary and the holding is not a blanket endorsement of using prior salary to justify pay differences. Bottom line: proceed with caution.

### *State and Local Law Considerations*

The *Rizo* decision comes in the middle of a recent wave of state laws and city ordinances aimed at prohibiting employers from even inquiring about wage history during the application and salary negotiation process so employers should be mindful of these potentially conflicting state laws and ordinances.

For instance, there are state and city ordinances banning the use of prior history in setting starting wages in [Philadelphia](#), [New York City](#), [Massachusetts](#) and Puerto Rico that will soon take effect, and similar bans are under consideration [in many other jurisdictions](#), including [San Francisco](#).

Also, the Ninth Circuit's decision in *Rizo* is squarely at odds with the California Fair Pay Act, [which expressly prohibits employers from justifying pay differences based solely on prior salary](#).

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<sup>3</sup> 691 F.2d 873 (9th Cir. 1982)

## Federal Law Considerations

There are also federal law considerations.

First, the *Rizo* court made clear that there is not a bright-line rule that allows employers to rely on prior salary in setting starting wages. The burden will be on the employer to persuade the fact finder that prior salary information was (1) used reasonably, and (2) serves a business purpose. Accordingly, employers should clearly define the business reason why they wish to rely on prior salary information and ensure that it is being used reasonably to set compensation.

Employers should be aware that there is a federal Circuit court split on the use of prior salary. The Tenth and Eleventh Circuits have held that the Equal Pay Act precludes employers from relying solely on prior salary, whereas others, like the Seventh and Eighth Circuits, have ruled that such reliance does not by itself violate the Equal Pay Act<sup>4</sup>.

## What Does this Mean for Employers?

Careful evaluation of your policies and practices around the use of prior salary is encouraged. Given the maze of federal, state and local laws that govern the use of wage history, employers should evaluate the laws that apply to their operations to ensure they are not unwittingly running afoul of these potentially conflicting obligations. The state and city ordinances may require modification of your employment applications and background screening materials.

The *Rizo* decision and the looming salary bans make it more important than ever for employers to ensure they have a clear compensation philosophy, a defined compensation structure, and a method of making equitable starting salary decisions. Once employers have the structure in place, ensuring internal equity is much easier and can be pressure tested with proactive pay equity audits undertaken with legal counsel.

Seyfarth Shaw is tracking this emerging area of law closely. We hope you will join Seyfarth's Pay Equity and Workplace Counseling & Solutions Groups for a joint Webinar on May 9th to discuss this litigation and the wave of wage history bans. You can register for *The Next Pay Equity Frontier: Salary History Bans* webinar [here](#).

If you have any questions or would like further information, please contact your Seyfarth attorney, [Annette Tyman](mailto:Atyman@seyfarth.com) at [Atyman@seyfarth.com](mailto:Atyman@seyfarth.com), [Jeffrey Berman](mailto:JBerman@seyfarth.com) at [JBerman@seyfarth.com](mailto:JBerman@seyfarth.com), [Michael Childers](mailto:MChilders@seyfarth.com) at [MChilders@seyfarth.com](mailto:MChilders@seyfarth.com), [Christine Hendrickson](mailto:CHendrickson@seyfarth.com) at [CHendrickson@seyfarth.com](mailto:CHendrickson@seyfarth.com) or [Elizabeth MacGregor](mailto:EMacGregor@seyfarth.com) at [EMacGregor@seyfarth.com](mailto:EMacGregor@seyfarth.com).

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<sup>4</sup> 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.")

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