Can Employers Consider Salary History Under The Equal Pay Act? Supreme Court Declines to Weigh In

Labor & Employment Law Update

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The Supreme Court declined to review a Ninth Circuit decision that would have answered a question currently splitting the circuits: may an employer consider employees' salary histories in setting their current pay without violating the Equal Pay Act (EPA)? As discussed in our previous blog article on January 14, 2019, the EPA prohibits employers from paying wages to employees of one sex less than employees of the other sex for equal work. The EPA holds employers strictly liable for differential pay, regardless of whether the employer had discriminatory intent, unless the employer can show that the difference in pay is based on one of four statutory exemptions. Employers may pay employees differently based on a seniority system, merit system, quality or quantity of production measurements, or a fourth catch-all factor listed as "a differential based on any other factor other than sex." Circuit courts are currently split on whether this fourth exemption allows an employer to set pay based on an employee's salary history. The Ninth Circuit was the first circuit to expressly prohibit employers' use of a prior salary defense to an EPA claim, stating that allowing employers to set current pay based on salary history would perpetuate the very gender-based pay inequalities the EPA set out to address.

On July 2, 2020, the U.S. Supreme Court announced it would not review the Ninth Circuit's decision in *Rizo v. Yovino*. In *Rizo,* the Ninth Circuit held that an employer cannot consider an employee's prior salary in setting his or her current salary without running afoul of the EPA. The Court held that an employer can only justify a pay differential based on a factor other than sex if that factor was job-related. It further held that an employee's prior salary is not job-related to the "employee's present position." The Court acknowledged that "prior pay could be viewed as a *proxy* for job-related factors such as education, skills, or experience related to an employee's prior job," but concluded that prior pay in and of itself is "not a factor related to the work an employee is currently performing."

Had the Supreme Court reviewed *Rizo*, it would have offered some much-needed clarity to the various and conflicting opinions of the federal appeals courts on this issue. While the Ninth Circuit now prohibits consideration of pay history under the EPA, the Seventh Circuit has ruled the opposite by holding that

employers may consider prior salary history in setting current pay. The Second, Eighth, Tenth, and Eleventh Circuits have issued rulings landings somewhere between these two extremes. For example, the Second Circuit allows employers to consider salary history if they can show a bona fide business reason to do so and the Tenth and Eleventh Circuits allow employers to consider salary history if it is not the sole consideration.

While courts grapple with whether the EPA prohibits employers from considering prior salaries, many legislatures are addressing the issue from another angle. Attempting to ameliorate the gender pay gap, states (including California, Massachusetts, Delaware, Oregon, Illinois, New York, New Jersey, Vermont, Washington, Maine and Colorado) and cities (including New York City, San Francisco, Cincinnati, Philadelphia, and New Orleans) have enacted legislation prohibiting employers from asking employees about their prior salaries or limiting an employer's use of salary history during the hiring process.

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