Supreme Court May Decide Whether the Equal Pay Act Allows Employers to Consider Prior Salary in Setting Current Salary

Labor & Employment Law Update

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The Supreme Court may soon answer a question that divides federal courts: may an employer consider an employee's salary history when setting pay without violating the Equal Pay Act (EPA)? 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 a discriminatory intent, unless the employer can show the difference in pay is based on a seniority system, merit system, quality or quantity of production measurements, or a fourth catchall factor. Federal courts question whether the fourth catchall factor – "a differential based on any other factor other than sex" – allows an employer to set pay based on an employee's salary history.

The Supreme Court recently announced it will, for the third time, consider a petition for review of the Ninth Circuit's decision in *Rizo v. Yovino*, which signals that the Court may take up the case. In *Rizo*, the Ninth Circuit held that an employer cannot consider prior salary in setting an employee's current salary without running afoul of the EPA. Referring to the gender pay gap as an "embarrassing reality of our economy," the Court noted that allowing employers to refer to prior salaries enabled the marketplace to perpetuate the gender-based wage differential that fueled the enactment of the EPA in the first place. The Court then clarified the meaning of the fourth catchall exception in the EPA, holding that "'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."

Should the Supreme Court agree to hear the *Rizo* appeal, the Court's ruling would offer some much-needed clarity for the various and conflicting opinions of the federal appeals courts on this issue. For example, while the Eleventh Circuit has held, similar to the Ninth Circuit, that the catchall exception is limited to "job-related factors," the Second Circuit has held that this same provision applies to an arguably broader category identified as "business-related reasons." Taking still

another approach, the Seventh Circuit has held that employers may consider prior salary history in setting current pay. In *Wernsing v. Department of Human Services*, the Seventh Circuit rejected the argument that basing current salaries on prior salaries inherently perpetuates discrimination. While the court conceded that, empirically, women are paid less than men, the court held that it cannot be assumed that a pay differential is the result of discrimination. Instead, plaintiffs must prove the disparity is based on sex for the specific market at issue.

While courts grapple with whether the EPA prohibits considering prior salaries, many legislatures are addressing the issue from another angle. Several states (including California, Massachusetts, Delaware, and Oregon) and cities (including New York City, Philadelphia, and New Orleans) have enacted legislation prohibiting employers from asking employees about their prior salaries in an attempt to ameliorate the gender pay gap. Should the Supreme Court review and affirm *Rizo*, all employers would be well-advised to follow the lead of these states and cities, and refrain from collecting applicants' salary histories. Stay tuned as we will continue to provide updates as new information on this area of the law emerges.

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