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Court OKs Using Salary History to Set Pay

By [Kate McGovern Tornone](#), Editor

Employers can pay men and women differently if that disparity is based on salary history, a federal appeals court has ruled.



The Equal Pay Act only prohibits [pay discrimination based on sex](#), the 9th U.S. Circuit Court of Appeals said April 27 in *Rizo v. Yovino* (No. 16-15372), and salaries are a “factor other than sex.” The ruling applies in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

The decision comes as several states and cities are adopting laws that prohibit employers from asking job applicants about their salary history. The measures are aimed at undoing decades of pay discrimination based on sex.

Facts of the Case

Aileen Rizo worked for the Fresno County (Calif.) public school system. When Rizo found out that her male coworkers were paid more for performing the same work, she complained.

The county explained that for employees in her job category, it maintained a policy of paying 5% more than they received at their previous jobs. She sued, alleging sex discrimination.

The law prohibits employers from paying men and women differently for the same work unless their salaries are based on: a seniority system; a merit system; a system that measures quantity or quality of production; or another factor other than sex.



In defending the claim, Fresno County argued that the pay disparity was lawful because it was based on a factor other than sex: prior salary.

A district court, however, determined that prior salary alone can never qualify as a factor other than sex. “[A] pay structure based exclusively on prior wages is so inherently fraught with the risk ... that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose,” the court held. The employer appealed.

Appeals Court Weighs In

On appeal, the 9th Circuit disagreed with the lower court. Citing its own precedent, the court explained that while an employer could “manipulate its use of prior salary to underpay female employees,” the consideration of prior salary isn’t always illegal.

Prior salary isn’t automatically a “factor other than sex” in every situation, the appeals court said. However, an employer can use that factor if it shows that the use effectuates a business policy and is reasonable in light of the employer’s stated purpose and practices.

Fresno County offered four business reasons for its policy: (1) it is objective because no subjective opinions about the new employee’s value enter into the starting salary calculus; (2) it encourages candidates to leave their current jobs for jobs at the county because they will always receive a salary increase; (3) it prevents favoritism and ensures consistency; and (4) it is a judicious use of taxpayer dollars.

The appeals court remanded the case, instructing the lower court to consider the county’s business reasons and determine whether it used salary history reasonably.

Salary History Bans

The *Rizo* ruling is in conflict with at least the 10th and 11th Circuits, which have held that prior salary alone cannot justify a pay disparity (*Angove v. Williams-Sonoma, Inc.*, 70 F. App’x 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)). Those courts together cover Alabama, Colorado, Florida, Georgia, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

And in at least six other areas, employers are forbidden from even asking about an applicant’s salary history, much less relying on it for compensation decisions (although some do allow reliance on that information if the employee volunteers it.)

It remains to be seen, however, whether these bans will survive legal challenges. A business group has sued Philadelphia, alleging that its ban violates business’ freedom of speech. The new law was set to take effect May 23 but the parties agreed to a stay while the litigation is pending.

For the full story and a list of active salary history bans, see [Judge Blocks Philly’s Salary History Ban](#).

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