

CLIENT NEWS BRIEF

Ninth Circuit Rules Employee's Prior Salary Cannot be used as Basis for Wages

The Ninth Circuit ruled in *Rizo v. Yovino* that using an employee's prior salary as a basis for establishing their initial salary is a violation of the federal Equal Pay Act.

The decision is based on a policy adopted by the Fresno County Office of Education, which determined a new employee's initial salary by adding 5 percent to their previous salary. The Ninth Circuit found that this policy was impermissibly based on sex, in violation of the federal Equal Pay Act, because using previous salary to set new wages carries the risk of perpetuating a discriminatory wage disparity from the employee's past employers.

Background

Aileen Rizo, the plaintiff in the case, was hired by Fresno County Office of Education as a math consultant after having been employed in Arizona as a middle and high school math teacher. Based on her low previous wages, Rizo was placed at step 1 of level 1 of the salary schedule. Several male math consultants, who previously worked in California, were hired after Rizo. Later, Rizo learned that she was being paid much less than her male counterparts and she filed a pay disparity complaint and subsequently sued the county office.

The federal Equal Pay Act prohibits paying female employees less than their male counterparts for similar work. There are four exceptions to this general rule, including when the difference in pay is based on a "factor other than sex."

The county office argued that their policy was lawful because the wage difference was based on Rizo's prior salary from Arizona, not because she is a woman, and therefore meets the catchall exception in the federal Equal Pay Act.

The Ninth Circuit disagreed, stating the Equal Pay Act's catchall exception should not be used to continue sex-based wage disparities, counter to the primary purpose of the Equal Pay Act itself. The catchall exception should instead be read in light of the law's surrounding context and legislative history to mean male and female employees can be paid differently based on a legitimate, job-related "factor other than sex," such as the employee's education, training, or experience. The Ninth Circuit also clarified that the decision would not prohibit continuing use of salary schedules, as long as an employee's prior salary is not used to set an initial or promoted employee's placement on the salary schedule.

This decision is consistent with Assembly Bill (AB) 168, which prohibits employers from asking job applicants for their salary history, as part of the Legislature's effort to equalize reported discrepancies in pay between men and women. AB 168 went into effect on January 1, 2018. ([See 2017 Client News Brief No. 68.](#))

If you have any questions about this case or need assistance revising your

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district's salary schedule criteria, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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