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State Legislatures, Local Governments and Courts Attack Employer Use of Salary History

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By **Robert Nichols and Lauren West** | April 23, 2018

While recognizing that the drafters of the Equal Pay Act of 1963 (EPA) had, in passing this law, spoken eloquently of the need for gender-based pay equality, the Ninth Circuit Court of Appeals recently observed that their legislative goal remains unfulfilled. Specifically, in its April 2018 en banc decision in *Rizo v. Yovino*, the Ninth Circuit lamented that "[s]alaries speak louder than words ... Although the [EPA] has prohibited sex-

based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy."

In particular, despite the long-standing prohibitions on sex-based wage discrimination codified in both the EPA and Title VII of the Civil Rights Act of 1964, women in the United States today continue to be paid, on average, only about 80% of what men receive for similar work.

In seeking to stamp out this persistent disparity, increasingly, state legislatures, city and county governments, and courts, like the Ninth Circuit, are now targeting employer use of salary history in establishing initial compensation levels for new employees.

Ninth Circuit Attacks the Use of Salary History Based on the EPA Itself

In *Rizo*, the Ninth Circuit considered whether an employer defending a pay discrimination claim under the EPA can effectively defend that claim by arguing that the disparity was not the result of gender, but was instead based upon salary history information. The employer in *Rizo* sought to defend its admitted use of salary history information under the EPA's affirmative defense allowing an employer to defeat a claim by establishing that an apparent pay disparity resulted from some "factor other than sex."

However, the court squarely rejected the argument that salary history was a legitimate "factor other than sex" that could defeat an EPA claim. Specifically, the Ninth Circuit concluded that "prior salary alone or in combination with other factors cannot justify a wage differential." The court found that "[t]o hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitem* – would be contrary to the text and history of the Equal Pay Act and would vitiate the very purpose for which the Act stands."

Importantly, the Tenth and Eleventh Circuits had previously concluded that, under the EPA, salary history cannot be the *sole* factor to justify a disparity. However, no circuit had gone so far as the Ninth Circuit did in *Rizo* to conclude that salary history, *even in combination with other factors*, could not justify an unequal pay level under the EPA.

Legislative Enactments Prohibiting Use of Salary History

Outside of the EPA's prohibitions on the use of salary history, as interpreted by the Ninth, Tenth, and Eleventh Circuits, a number of states and local governments have enacted laws prohibiting employers from actively acquiring and using compensation history information in hiring and establishing compensation levels. Specifically, California, Massachusetts, Delaware, and Oregon have established state laws banning the use of salary history by not only governmental employers but also by those in the private sector. Additionally, Puerto Rico and a number of local governments, including New York City, Philadelphia, San Francisco and Albany and Westchester Counties in New York state, have adopted bans on employer use of salary history. Further, a variety of different states and local governments are considering adopting similar laws banning the use of salary history.

The explanation offered by California State Assembly Member, Susan Eggman, a primary sponsor of California's salary history use ban, typifies the rationale underlying these laws. Specifically, Assembly Member Eggman explained that "[t]he practice of seeking or requiring the salary history of job applicants helps perpetuate wage inequality that has spanned generations of women in the workforce." In other words, once a woman is paid less based upon gender, the use of salary history by her subsequent employers fosters continued pay inequality.

Notably, while these new laws all effectively prohibit employer acquisition and use of compensation history, the enactments vary in certain respects. For example, some of these laws, like the Massachusetts statute, only prohibit employers from seeking "the wage or salary history of a prospective employee from the prospective employee or a current or former employer." On the other end of the spectrum, the New York City

ordinance broadly bars employers from communicating "any question or statement to an applicant, an applicant's current or former employer, or current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history." As a result, if an employer merely asked one of its own employees who used to work with the job applicant at a different company how much that applicant earned when they worked together previously, the employer would be violating the law.

Importantly, these bans on the use of compensation history generally extend to benefits, and not just salary. As a result, inquiring about an applicant's previous bonus or 401K match would also violate these laws. Additionally, these bans not only prohibit employers from making inquiries into an applicant's salary or benefits history, they also bar an employer from *using* that information. Therefore, in some jurisdictions where an employer might have obtained information about salary history in a manner not violative of the law, the employer still may not use that salary history information in establishing initial compensation.

Conclusion

The proliferation of state and local laws prohibiting the use of compensation history, along with the Ninth Circuit's interpretation under the EPA invalidating the use of salary history as a justification for pay disparities, practically means that multi-state employers have little choice but to end the use of compensation history as a means for determining initial salaries. This is because, for most busy human resource professionals and hiring managers, utilizing compensation history in some states and localities and not others is simply not a viable option.

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