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The Equal Pay Pendulum

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Equal pay has been in the news of late, with marches and other efforts by advocates to raise public awareness of pay inequity between men and women in the workplace. These efforts have focused on strengthening the 1963 Equal Pay Act, which requires employers to pay men and women the same for equal work. Recent developments on the judicial and legislative fronts have addressed pay practices that can impact pay inequality, and these developments may prompt employers to change the way they pay their employees.

Ninth Circuit: Employers Can Pay Men and Women Differently Based on Prior Salary

In *Rizo v. Yovino* (No. 16-15372, April 27, 2017), the Ninth Circuit held that prior salary can be a "factor other than sex" under the Equal Pay Act for pay differences, provided the employer shows that prior salary "effectuate[s] some business policy" and the employer uses prior salary "reasonably in light of [its] stated purposes as well as other practices."

Rizo was a math consultant for the Fresno County (Calif.) public school system. She sued the Superintendent under the Equal Pay Act after she discovered she was paid less than her male colleagues holding the same job. The Superintendent argued that its pay schedule was based on the previous salaries of the employees, and the difference in pay between Rizo and her male colleagues was based on a policy of paying 5% more than they received at their previous jobs. Under the Equal Pay Act, employers must pay men and women the same for doing 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. The Superintendent in *Rizo* maintained that its policy of utilizing pay from previous jobs was a "factor other than sex."

The district court found for Rizo and held 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," according to the court.

On appeal, the Ninth Circuit reversed. 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. The Court noted four reasons supporting the business purpose of the Superintendent's policy. The policy (1) was objective; (2) encouraged candidates to seek employment with the county because they would receive a 5% pay increase over their current salary; (3) prevented favoritism and ensured consistency in application; and (4) was a judicious use of taxpayer dollars. Though prior salary is not automatically a "factor other than sex," the court said that an employer can use prior salary if it effectuates a business policy and is reasonable in the context of the employer's stated purpose and practices.

The *Rizo* ruling may be headed to the Supreme Court; the decision conflicts with decisions in other federal appellate courts that came to different conclusions. Before any Supreme Court

review happens, however, Washington may take its own steps to prohibit employers from using pay history in their compensation policies.

Washington: Proposed Legislation Banning Pay History Inquiries

In the current legislative session in Olympia, proposed H.B. 1533 would prohibit an employer from seeking the wage or salary history from a job applicant or a current or former employer. If an applicant requests, an employer must provide the wage scale or salary range for a position to an applicant. An employer also may not require that an applicant's prior wage or salary history meet certain criteria. However, an employer may confirm an applicant's wage or salary history if voluntarily disclosed by the applicant, and after an offer with compensation has been negotiated and made to the applicant. A related measure, the Equal Pay Opportunity Act (H. B. 1506) would amend the Washington Equal Pay Act by prohibiting pay secrecy policies, allowing discussion of wages, banning retaliation against workers that ask for equal pay, and offering administrative options as well as damages if private action is pursued. Both measures remain alive as of this writing in the current special legislative session. If these measures become law, Washington would join several other states and local governments in restricting employer use of an individual's pay history in making compensation decisions.

Conclusion

Despite the Ninth Circuit's *Rizo* holding that creates an avenue for employers to consider pay history in its compensation policies, state and local governments, including Washington, are introducing measures to disallow such practices and to mandate other restrictions designed to promote equal pay for equal work. Employers should always have pay policies that are reasonably related to legitimate business purposes. These can include a pay policy or practice that is based on an individual's prior pay. It remains to be seen if such an approach will survive the current Washington special legislative session, or later Supreme Court review of *Rizo* if one occurs. Stay tuned.