

Update: The Equal Pay Act and Salary History Bans: What You Need to Know

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In our January 2020 alert, we discussed the Ninth Circuit's decision in *Yovino v. Rizo*, which was decided under the Equal Pay Act. On February 27, 2020, the Ninth Circuit issued a new opinion affirming the district court's order denying defendant's motion for summary judgment. In an *en banc* decision the court held that plaintiff's prior salary was not a "factor other than sex" that allowed defendant to pay her less than male employees who performed similar work. The decision reiterated that only job-related factors may serve as affirmative defenses to Equal Pay Act claims and that prior pay does not qualify as a job-related factor.

Historically, some employers have relied on an applicant's prior pay rate to set an employee's salary. As a result, employees who had a record of higher pay were awarded higher salaries. But because of the vestiges of unequal pay for women, employers should be wary of using it as a factor going forward as the court's holding makes clear that prior pay history is not a job-related factor that can defeat an Equal Pay Act claim.

To comply with the Equal Pay Act and salary history bans that have been enacted in many jurisdictions, we continue to recommend that employers take a proactive approach.

- Review current and pending salary history bans and equal pay laws in your jurisdiction;
- Ensure job applications do not ask applicants to disclose their salary histories or prior pay;
- Do not ask applicants about their salary history during the interview process;
- If your company uses recruiters to assist with hiring, ensure that those companies do not seek salary history information from applicants;
- Employers may rely on an applicant's salary requirements and expectations, and use an applicant's experience and education to determine pay;
- Review salary data for men and women in the same positions to ensure that any pay disparity is justified by experience, education or job performance and not based on gender; and
- Consult with employment counsel for guidance on relevant regulations to help your company avoid pay disparities, discover potential pay disparities, or defend wage and hour claims against your organization.