

## Employers Cannot Rely On Prior Salary To Justify Wage Differential In Equal Pay Act Cases

Effective January 1, 2018, California employers are prohibited from asking an applicant about their salary history. Now a Ninth Circuit decision, *Rizo v. Yovino*, (9th Cir. 16-15372 4/9/18), has made it clear that employers are prohibited from making a salary determination based on the applicant's prior salary history.

The court, in an en banc opinion, held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees. The court decided that, under the federal Equal Pay Act, prior salary is not a legitimate measure of work experience, ability, performance, or any other job-related quality. According to the late Judge Reinhardt, "[t]o hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands."

Instead, salary differentials are limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Notably, the Court clarified that the "Equal Pay Act 'creates a type of strict liability' for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is not required to prove discriminatory intent."

This decision is in line with California's Fair Pay Act, which admonishes that prior salary alone cannot justify any disparity in compensation, and limits the permissible reasons for pay differences to: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; (4) a bona fide factor other than sex, including education, training, or experience.

This decision serves as a reminder that employers should review their pay practices, and carefully scrutinize whether permitted factors explain pay differences.

by Lisa M. Pooley & Dorothy S. Liu  
& Emily Leahy



For more information, please contact:

**Lisa M. Pooley**, Partner  
415-995-5051  
lpooley@hansonbridgett.com

**Dorothy S. Liu**, Partner  
415-995-5046  
dliu@hansonbridgett.com

**Emily Leahy**, Counsel  
415-995-5155  
ELeahy@hansonbridgett.com