

9th Circuit Holds that Prior Salary is Not a Defense to An Equal Pay Act Claim

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Yesterday, the full Ninth Circuit held that an employer cannot rely on an individual's prior salary to justify a wage disparity between a male and female employee.

In [Rizo v. Yovino](#), a female math teacher brought a claim under the Equal Pay Act ("EPA") against the school district for paying her substantially less than her male counterparts. The school district did not dispute that she was paid less and instead asserted that it determined her salary based on her past salary. Thus, the school district argued its actions fell under one of the EPA's affirmative defenses – that the pay disparity was due to "any other factor other than sex."

Here, the Ninth Circuit determined that the affirmative defense of "any other factor other than sex" was limited to *job-related factors* only. The court held that an employee's prior pay is not job-related, and not a factor other than sex for EPA purposes. It held that because prior pay may carry with it the effects of sex-based pay discrimination, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay determination.

Although employers cannot rely on prior salary alone to defend a wage disparity under the EPA, the court acknowledged that an employer may still consider prior pay when employees disclose it voluntarily. The Court "recognize[d] there may seem to be tension" between allowing employers to consider prior pay in setting wages, but not allowing prior pay to be used to defend an EPA claim. The takeaway for California employers is that they should have a bona-fide job-related factor other than prior pay (or sex) when setting an employee's compensation.

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