

## CLIENT ALERT

### Ninth Circuit Holds that Prior Salary Does Not Justify Pay Disparities

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Last week the Ninth Circuit, en banc, held in *Rizo v. Yovino* that employers cannot use an employee's prior salary, alone or in combination with other factors, to justify a wage differential between men and women under the Equal Pay Act (EPA). This is a significant development in the evolving area of pay equity. The *Rizo* decision overruled the court's 1982 decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), which held that an employee's prior salary is a "factor other than sex" upon which a wage differential may be based under the EPA. Rejecting the prior *Kouba* decision, the court held that "factors other than sex" include "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." The court in *Rizo* reasoned that "[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 [EPA], and would vitiate the very purpose for which the Act stands."

There is currently a split in the federal circuit courts on the question of whether and to what extent employers may use salary history in setting salaries, making this question potentially ripe for review by the United States Supreme Court. The issue has been further complicated by recent enactment of several state and local salary history bans and pay equity laws, which place additional restrictions on the criteria employers may obtain and use in setting salaries. Employers should therefore understand the laws in the jurisdiction(s) in which they operate, adjust pay policies and practices to ensure they do not take into account impermissible factors in setting salary, and conduct privileged analyses of compensation decisions to determine whether they are based on legitimate, non-discriminatory factors and make adjustments where necessary.

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