

Use of Salary History Taboo? Ninth Circuit Weighs In

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Use of one's last salary or salary history to determine compensation can be a proxy for sex discrimination. Once considered a legitimate "factor other than sex," some jurisdictions are banning the use of a job candidate's salary history to determine compensation as it has perpetuated pay inequities between the sexes. The [Ninth Circuit Court of Appeals is the highest-profile court to address, and ban, use of salary history](#) in the employment setting in most (but not all) cases.

The case involved Aileen Rizo, an employee of the Fresno County Office of Education hired in October 2009. Her starting pay was determined by a formula: take the person's past (or last) salary, add 5% to that amount, and then match the resulting sum to the corresponding spot on the pay grade system. For Rizo, this meant she started work at the County at Step 1 of Level 1. One can imagine her disappointment to learn that her peers were hired at higher steps. Her disappointment led to litigation over the County's use of salary history to justify compensation. The County moved for summary judgment, which the court denied. The County appealed.

Writing for the majority, the late Judge Reinhardt summarized the issue as follows: can an employer justify a wage differential between male and female employees by relying on prior salary? The court answered that question "a clear no." That meant salary history could not on its own, or in combination with other factors, be used to determine compensation. "To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate the gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act." While court left the door open as to whether salary history could ever be used in compensation decisions (the court was purposefully vague here), the opinion is a strong-worded missive that employers consider merit—that is, actual experience, education, and ability—when determining compensation, giving women true opportunity to earn that which a man with the same skills, ability, and experience earns.

When determining pay, employers in the Ninth Circuit and beyond should shift emphasis away from job applications and interview techniques that focus on past pay to indicators or merit. Use objective factors when making employment and compensation decisions and document those factors. As the Ninth Circuit reminded us, the Equal Pay Act "creates a type of strict liability" for employers who pay men and women differently for the

same work. Once this differential is shown, no intent to discriminate has to be shown. The painful consequence of failing to address internal pay disparities now is sizable liability down the road. Internal compensation audits, along with solid job classification practices, will help shield your company from lawsuits and liability should one come.

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Topics

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