The latest development in the law surrounding use of employee and applicant salary history data provides further reason for employers to reconsider the practice of asking to disclose their salary history. On April 9, 2018, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Rizo v. Yovino*, which clarified that prior salary information may not be used to rationalize pay disparities between male and female employees under the federal Equal Pay Act (EPA). Under the EPA, which prohibits wage discrimination on the basis of sex, employers cannot pay higher wages to members of the opposite sex for equal work on jobs which require equal skill, effort, and responsibility and are performed under similar working conditions. The EPA places the burden on employees to demonstrate that they were paid less because of sex. Once that burden is met, employers may assert any of these four affirmative defenses that permit certain wage disparities:

- A seniority system;
- A merit system;
- A system which measures earnings by quantity or quality of production; and/or
- A differential based on “any factor other than sex.”

After an *en banc* rehearing, the Ninth Circuit held in *Rizo v. Yovino* that prior salary is not “job related” and thus does not fall within the exception to the EPA that allows employers to pay unequal wages. The court further held that “any factor other than sex” is limited to “legitimate, job-related factors” such as educational background, prior work experience, ability, and prior job performance. The court also overruled its 1982 decision in *Kouba v. Allstate*, a decision many courts (and employers) had previously
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relied on to conclude that a prospective employee’s prior salary is an acceptable factor for employers to consider in setting wages, and that prior salary alone constitutes a permissible “factor other than sex” under the EPA. See *Kouba v. Allstate Ins. Co.* The *Rizo* decision places the Ninth Circuit more in line with the Tenth and Eleventh Circuits, which have held that the EPA bars employers from using salary history as the sole justification for a pay disparity. See *Angove v. Williams-Sonoma, Inc.* and *Irby v. Bittick.* Yet the *Rizo* decision is still at odds with Seventh and Eighth Circuit precedent holding that employers may rely (albeit cautiously) on prior salary information to justify disparate compensation under the EPA. See *Wernsing v. Dep’t of Human Servs.* and *Taylor v. White.*

Although this circuit split could ultimately reach the U.S. Supreme Court for resolution, a recent surge in legislation over the matter suggests that states and localities are growing increasingly antagonistic toward employers’ use of salary history information in determining compensation. Over the past year, numerous states and localities have enacted laws banning private employers from asking applicants for their salary history information, including California, Delaware, Massachusetts, Oregon, Puerto Rico, Philadelphia, San Francisco, and New York City. Other states are considering similar legislation, including Idaho, Maryland, New York, Rhode Island, Texas and Virginia. Additional jurisdictions have passed legislation that prohibits the government from inquiring about prior salaries, but does not restrict private employers.

These salary history bans generally prohibit employers from asking applicants about their prior salary during the hiring and salary negotiation process. While each jurisdiction’s law varies, “salary” is typically defined broadly to include all forms of compensation and fringe benefits. The asserted intention of these bans is to level the playing field for women and minorities, who historically have been subject to pay discrimination. The laws seek to stop prior wage discrimination from being perpetuated and compounded, and to ensure that employees are paid for what their jobs and skills are actually worth. However, applicants usually remain able to voluntarily disclose salary history information. Again, each jurisdiction’s law has specific nuances.

Practical Guidance for Employers

Given this legal landscape, employers should strongly consider eliminating salary history inquiries from their hiring and salary negotiation processes entirely, or at minimum, eliminating the inquiry from an initial employment application—particularly if the employer recruits nationwide. The law is changing rapidly and there is significant risk to a blanket practice of salary history inquiries. If an employer believes salary history information is necessary in a jurisdiction where this inquiry is not prohibited, salary history information should be obtained later in the application process and not on the initial employment application. Any time an employer wants to ask about salary history, it should ensure that the salary-based questions are related to a legitimate business policy or reason. Moreover, historical salary data for many professions is publicly available online, which may obviate the need to ask the applicant/employee for this
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information directly.

Employers should also regularly audit their compensation practices to ensure pay equity across gender, race and other protected classes. Legitimate business reasons such as skill, experience, training, education, and other relevant job factors should be used to justify starting salaries, bonus amounts, and other compensation decisions. Finally, employers should document the reasons for their compensation decisions and be able to explain pay differences using objective, job-related criteria.

For more information on salary history inquiries, please contact Amy Conway, Carrie Francis, Alexis Gabrielson, Jennifer Ives, Sharon Ng, Greta Reyes or the Stinson Leonard Street contact with whom you regularly work.

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