

## To Ask or Not to Ask about Prior Compensation – That Is the Question

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The Ninth Circuit Court of Appeals issued a recent ruling that wage disparity based on “prior salary alone or in combination with other factors” violated the Equal Pay Act (*Rizo v. Yovino*).

The court adopted the viewpoint that the objective of the Equal Pay Act is to eliminate long-standing pay disparities, not to preserve them, going as far as stating that “acceptable factors of pay disparities should be limited to legitimate, job-related factors such as prospective employee’s experience, educational background, ability, or prior job performance.” From a practical matter, this opinion overturned the longstanding and accepted practice (since 1982) that viewed employee’s pay history as one of the federal law’s catchall exceptions that are “based on any other factor than sex.” Said another way: if a prior employer based wage decisions inaccurately, why should the new employer continue this (potential) discriminatory practice?

The case will be petitioned for review to the Supreme Court of the United States. The appeal documents contain a preview of some of the ideas that might be argued, including details contained in the concurring opinions. Specifically, although certain judges agreed with the ultimate ruling, they did disagree with some of the rationale for the conclusions.

### Impact for Employers:

Employers should continue to review all aspects of their pay practices to insure that they can ultimately defend and conclude that they are not discriminatory. It would also be a good practice to examine internal procedures, as well as those utilized by any external recruiters, to comprehend the type of data that is accumulated as part of this process and to fully understand how starting salaries are established.

[Please share your thoughts!](#)

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