

# What Employers Need to Know Now About the Ninth Circuit's Salary History Decision

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The Ninth Circuit Court of Appeals recently released its opinion in [Rizo v. Yovino, No. 16-15372 \(April 9, 2018\)](#). In this high-profile case, the court held that “prior salary alone or in combination with other factors cannot justify a wage differential” between male and female employees. This article provides practical answers to employers’ questions regarding the ruling.

## **How can employers revise or review their pay practices in light of the ruling?**

Employers operating within the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) may want to evaluate what role, if any, prior salary plays in its decisions in connection with setting starting pay for job applicants. This may include reviewing policies, procedures, practices, and forms to determine whether they seek prior salary information in connection with the application process and eliminating those questions. This may also involve a more

critical review of the process by which starting pay is determined and the identification of legitimate, appropriate factors that decision makers may consider. Clearly, under the ruling in *Rizo*, prior salary—alone or in conjunction with other factors—will not serve as a legitimate reason for a pay difference.

In addition, if prior salary has been used in the past as the basis to set starting pay and has resulted in pay differentials between male and female employees, employers may want to consider [conducting an analysis of current pay data](#) to determine whether any pay differentials can be justified by legitimate factors such as experience, performance, or production. In other words, employers may want to take steps to ensure that if prior salary played a role in a compensation decision in the past, the effects of that role have been replaced by other legitimate factors.

## **Is it likely that this case will make its way to the Supreme Court of the United States?**

Counsel for the defendant in this case has indicated that the defendant plans to petition the Supreme Court for *certiorari*. Given the deep split between the circuits on the issue, it seems more likely than not that the Supreme Court would grant *certiorari*. It certainly would be helpful to have the issue decided by the Supreme Court to add some clarity and provide a determination that applies across the United States, especially with respect to application of federal laws.

## **What is the significance of the Ninth Circuit's decision for employers?**

This decision is part of a larger trend in which lawmakers and courts are starting to reject the validity of using salary history information in setting the starting pay for job applicants. Employers operating in states located within the jurisdiction of the Ninth Circuit, as well as those operating in other jurisdictions that prohibit employers from asking about and/or relying on salary history in setting compensation, may want to remove this factor from consideration when setting salaries.

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