

## Employment Law Update

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### A Ninth Circuit: Prior Salary History Doesn't Justify Wage Differences

The Ninth Circuit recently ruled that prior salary alone or in combination with other factors does not justify a differential in wages between males and females. *Rizzo v. Iovino*, 2018 U.S. App. LEXIS 8882 (9th Cir. Apr. 9, 2018).

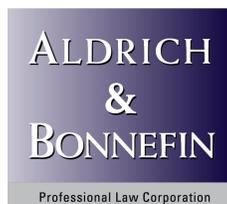
The Equal Pay Act (EPA) prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. While the law seems clear that men and women should receive equal pay for equal work regardless of sex, what is less clear, and the issue brought before the Ninth Circuit, is whether an employer has an affirmative defense if it considers prior salary, either alone or in combination with other factors, when determining an employee's salary.

In this case, a female math consultant of Fresno County Office of Education sued the County, alleging that she was paid less than her male counterparts for the same work in violation of the EPA, among other laws. The County asserted that the discrepancy was based on Rizzo's prior salary. The County argued that an employee's prior salary can constitute a "factor other than sex" within the meaning of the

EPA's fourth catchall exception, as emphasized below:

*No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.*

The Ninth Circuit found that the EPA grouped the fourth catchall phrase – a "factor other than sex" – with the three other specific exceptions which were based on systems of seniority, merit and productivity. The court noted that these specific systems share more in common than mere gender neutrality. According to the court, all three relate to job



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qualifications, performance and experience. Thus, the court reasoned that that the catchall exception should be limited to legitimate, job-related reasons as well. As such, the court held that prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. While the court indicated that prior salary may bear a rough relationship to legitimate factors other than sex (such as training, education, ability or experience) the “relationship is attenuated.” More important, relying on prior salary may well operate to perpetuate the wage disparities the EPA prohibits. The court went on to provide that an employer must point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.