

## Ninth Circuit Tears Down Equal Pay Act Loophole

By Anne Luquette, J.D. Candidate 2022 | March 5, 2020

For many women in America, discovering their male coworkers are paid more for the same job is not a novel experience. The [gender pay gap](#) – now a difference of about 21 cents per dollar – is perpetuated by employment practices that rely on valuing women’s salaries based on their past earnings. Historically, companies have used female plaintiffs’ past earnings as a defense in suits brought under the Equal Pay Act (“EPA”). On Thursday, the Ninth Circuit ruled in [Rizo v. Yovino](#) that defendants may not use prior pay rate as an affirmative defense to EPA claims.

As for the facts, the plaintiff, Aileen Rizo, was hired as an experienced math consultant by the Fresno County Office of Education at a salary well below that of her male counterparts and less than the male entry-level employees. After learning of the stark pay discrepancies, Rizo filed suit under the EPA. The EPA offers [four exceptions](#) for which a man may be paid more than a woman for “substantially similar” work: “(1) seniority; (2) merit; (3) the quantity or quality of the employee’s work; or (4) ‘any other factor other than sex.’” The defendants argued that female salary history is encompassed in the fourth exception. However, the court reasoned that the fourth exception is exclusively relevant to value-driven factors, and thus, past pay is irrelevant under this exception. This ruling closes a “loophole that perpetuated gender inequities,” allowing employers to justify discrimination by pointing to a past injustice and using it to avoid liability.

But not all jurisdictions follow the Ninth Circuit’s approach. Currently, there is a circuit split on the issue, which may prompt the Supreme Court to intervene. The Ninth Circuit’s holding is joined by the Second, Fourth, Sixth, Tenth, and Eleventh Circuits. The Seventh and Eighth Circuits, however, have found the language, “factor other than sex,” to include past pay. As a result, companies should proceed with caution and have an understanding of their jurisdiction’s ruling on the issue. That being said, best practices indicate cause for removing the practice entirely.

[Recently](#), many companies have taken active steps to address the gender pay gap. A vast number of companies have removed salary history questions from their interview process and implemented standard metrics that determine salary based on the prospective employee’s value creation rather than the amount they were previously paid. Some states ban the inclusion of pay history questions altogether. As for the EPA’s regulatory regime, businesses may be held liable



regardless of their intent. Thus, this places pressure on businesses to maintain an annual internal auditing system to identify any potential gender pay discrepancies and implement reasonable corrective measures.

The *Rizo* ruling functions to narrow the exceedingly broad definition of “factor[s] other than sex” and set a higher standard for business hiring practices. Companies must now look toward preventative measures to ensure equity for their employees and new hires. Hopefully, courts will continue to demand pay equity regardless of past injustice.