

Prior salary can't justify pay difference

California employers beware: The 9th Circuit Court of Appeals has issued a landmark Equal Pay Act decision that may require you to make immediate changes to how you set starting salaries. If you base new employees' pay on their past salaries, so a member of one sex ends up being paid less for the same position, you may be violating the Equal Pay Act.

The EPA does let employers base pay differences on factors "other than sex." Until now, prior salary was one such a factor. Here in the 9th Circuit, that's no longer true.

Recent case: Aileen was hired as a math consultant for a school district. Before taking the job, she earned about \$50,000 in another state. The school district had a clear policy that starting salaries were based on prior salary plus 5%. Soon after Aileen started work, she learned that male math consultants hired after she started were earning more.

[She sued, alleging EPA violations.](#) She argued that using prior salary to justify unequal pay for the same work perpetuates past discrimination and should not be allowed as a factor other than sex.

[The 9th Circuit Court of Appeals agreed,](#) concluding that "prior salary does not constitute a factor other than sex." The court said that legitimate factors other than sex include an applicant's experience, educational background, ability and prior job performance, but not prior salary.

The court did not say, however, that employers could not engage in negotiations over pay based in part on past salary. The decision merely held that a policy that dictated salary based on a formula that uses past salary as the starting point violates the EPA. (*Rizo v. Yovino*, 9th Cir., 2018)

Advice: If you use past salary to set starting pay, consult your attorney to determine if you need to make changes. This is a hot employment law topic that's sure to result in more lawsuits.