

Laws Banning Employers from Requesting Salary History

By Raquel Hoover Crump



“How much did you make in your last position?” That is one question job applicants hate to be asked. Most recently, lawmakers have joined in applicants’ disdain for this very question. Lawmakers are concerned that the question (and answer) may perpetuate pay disparities based on gender, race and other protected characteristics.

According to the 2015 U.S. Bureau of Labor Statistics, women working in full-time positions had median earnings that were 81% of men’s median earnings.¹ At the federal level, the Paycheck Fairness Act² and Pay Equity for All Act of 2017³ have been reintroduced as steps toward addressing pay disparities in the context of salary histories but whether such measures will pass is uncertain.

Recently, states and cities have taken matters into their own hands by enacting laws that prohibit employers from asking job applicants about their salary histories. To date, seven (7) states and cities (Puerto Rico, Oregon, New York City, Delaware, California, San Francisco, Massachusetts, and Philadelphia) have passed such legislation. Additionally, nearly 30 states, D.C., and numerous cities have *introduced* similar laws.

Puerto Rico’s pay history ban⁴, for example, prohibits salary discrimination based on sex in jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions, unless compensation is made pursuant to a seniority or merit system; a system which measures earnings by quantity or quality of production; or a

¹ U.S. Dep’t of Labor Statistics, Highlights of women’s earnings in 2015, *available at* <https://www.bls.gov/opub/reports/womens-earnings/2015/pdf/home.pdf>.

² The Paycheck Fairness Act (S. 819 and H.R. 1869) would add procedural protections to the Equal Pay Act of 1963 and the Fair Labor Standards Act of 1938. Essentially, the measure would prohibit employers from retaliating against workers who share wage information, put the burden on employers to articulate a non-discriminatory reason for pay disparities, and allow employees to seek punitive damages for wage discrimination.

³ H.R.2418. The stated purpose of the Act is “to amend the Fair Labor Standards Act of 1938 to prohibit certain practices by employers relating to restrictions on discussion of employees’ and prospective employees’ salary and benefit history, and for other purposes.”

⁴ Law No. 16-2017.

differential based on a factor other than sex. Additionally, employers are prohibited from asking about or confirming an applicant's salary history, unless the applicant has volunteered the information, or the salary was already negotiated and stated in an offer letter. An aggrieved employee may bring a civil action against the employer. Available damages include back pay, plus an equal amount as a penalty, attorney's fees, and expenses.

New York City's legislation⁵, which went into effect on October 31, 2017, restricts employers from inquiring into an applicant's salary history, including asking the applicant direct questions about past pay and making similar inquiries to the applicant's current or prior employer. Prospective employers are prohibited from relying on current salary history in the determination of salary, benefits, or other compensation, unless the candidate voluntarily discloses the information. The New York City Commission on Human Rights may impose a civil penalty of up to \$125,000 for an unintentional violation and up to \$250,000 for a "willful, wanton, or malicious act." Individuals may bring suit against an employer and remedies include back pay, compensatory damages, and attorneys' fees.

Employers should expect more legislation and be prepared to review and possibly change their recruiting, interviewing and other hiring practices and procedures. How can employers prepare to make changes to their existing practices to ensure compliance? Consider the following:

- Be aware of which jurisdictions have enacted salary history laws and the effective dates of these new laws. For example, Puerto Rico's salary ban law went into effect on March 8, 2017, but employers are not liable for violations until March 8, 2018.
- Audit internal hiring and interviewing policies, procedures, forms and practices and make changes where necessary to minimize the risk of non-compliance.
- Audit compensation structures and practices to identify, analyze and possibly correct any unjustified pay disparities.
- Notify recruiting and background check organizations of any revisions made to interview questions, forms, policies and practices.
- Train staff involved in the hiring process.

For more information about salary history bans or for compliance assistance, contact Raquel Hoover Crump at rcrump@theemploymentlawsolution.com.

⁵ Int 1253-A.