
SB on HR

Legislatures are Making Salary History Inquiries a Thing of the Past

In this era of "fake news" and questionable facts, two things that cannot be challenged by fact checking or Snopes.com are the underrepresentation of women and the pay disparity between females and males in STEM fields. Much ink has been spilled about the former and, assuming you would like to see an increase in females in STEM professions, addressing the latter would certainly help. But STEM fields are not alone when it comes to pay disparity between men and women. And pay disparities are not solely reserved for men and women but also impact minority groups as well. Pay disparity is a well-known phenomenon that in recent years has started to see legislative action designed to address these pay gaps between white males and others.

The most recent methodology being used by various lawmaking bodies at all levels of government, is the salary history inquiry ban. Massachusetts was the first jurisdiction to pass such a law in August 2016. The concept is simple-ban employers from asking applicants to list their salary history to break the cycle of pay discrimination that presumptively impacted the female and minority applicants' salary histories.

But the question, "what is your current salary?" is not one that is openly discriminatory. It enables companies to eliminate applicants seeking more than the position pays or to hire qualified workers at a net positive salary for the company. The logic behind these laws is that pay discrimination will continue if workers who have suffered pay discrimination in the past have their future salaries based in part on their past earnings. Some laws go even further and prohibit relying on salary history information even if volunteered by the applicant or discovered in some other manner.

Is your firm or company effected?

The following chart lists those states and localities where private employer salary history bans are in effect, as well as providing certain other key prohibitions in the laws as well.

<i>State</i>	<i>Other Significant Details of Law</i>
California	Also precludes using salary history if obtained other than by asking to determine compensation and requires employers to provide pay scale information to applicants upon request.
Connecticut	Law passed, awaiting Governor's signature.
Delaware	Also precludes screening candidates based on past compensation.
Massachusetts	Also provides that prior compensation cannot be used as a defense to pay disparity claim.
Oregon	Also precludes disparities in compensation on basis of any protected characteristic.
Puerto Rico	Also precludes disparities in compensation based on gender.
Vermont	Also precludes seeking salary history from past/current employer and determining whether to interview applicant based on salary history.
<i>Local Jurisdictions</i>	
Albany, NY	Permits inquiry after job offer.
New York City, NY	Also precludes using salary history if obtained other than by asking to determine compensation.
Philadelphia, PA	Currently stalled due to legal challenge.
San Francisco, CA	Also precludes disclosing current or former employee's salary information without consent.
Westchester County, NY	Under limited circumstances can confirm past compensation and use information to set compensation upon hiring.

While this chart reflects laws that have passed, more than 40 such laws were proposed in 2017 and 2018 has many laws pending votes as well. Thus, it is worth periodically checking whether your state or local jurisdiction has such a law pending and whether it passes or not. Washington State currently has salary history laws working their way through both the state senate and house.

In addition to governments, it should be noted that some large employers are voluntarily banning salary history inquiry from their hiring processes. To date, such employers include Amazon, Bank of America, Wells Fargo, Progressive and others.

Of course, for every action there is an equal and opposite reaction. Some states are passing laws making it illegal for local governments to pass their own laws banning salary history inquiries. Currently, Michigan and Wisconsin have both passed such measures at the state level. Iowa, North

Carolina and Tennessee have more general laws preempting local governments from adopting employment laws that exceed or conflict with the requirements of state or federal law.

What should you do if your firm or company operates in one of these locales?

Obviously, the first step is to do whatever is necessary to comply with the law in the impacted locale. That may mean revising your written or online application forms or ensuring that third-party recruiters are not asking for salary history. You may need to revise internal policies on interviewing and provide training to those managers or personnel who conduct applicant interviews. Such policies and training address the riskier aspect of compliance—the human interactions during interviews. While questions about salary history will be improper, those about salary expectations are still permitted.

One other potential approach to consider is deciding to discuss or provide salary ranges early in the application or even advertisement process to eliminate candidates that are not willing to accept a position within the applicable salary range you have assigned to the open position.

Expert advice and early feedback in locales that have such laws in place is that employers are now relying more on market data and job requirements analyses to set target salaries or ranges. It will be important for employers to be able to justify starting salaries within those pay ranges based on factors such as merit, skills, licensure/certifications, experience and education in order to avoid the appearance of discrimination based on gender or minority status.

Finally, to protect your firm or company, document your efforts to preclude obtaining or relying on salary history. If you check references, do not ask for salary history and have the notes of the communication with the reference reflect what was asked and that salary information was declined in offered. If an interviewee raises past salary on their own, have the interviewer stop them, explain they are not interested in that information and record that in the interview notes, without mention of the salary.

What should you do if your firm or company does not operate in one of these locales?

The easy answer is you do not have to do anything. But that may not be the wise answer. Aside from the fact that closing pay disparities based on actual or systemic discrimination is a good thing, as is a diverse workforce, continuing the old practice could be risky even if allowed in your jurisdiction. While there may be no federal, state or local law prohibiting asking about salary history where your firm is, plaintiffs' lawyers will continue to attack such practices under existing laws and creative theories. Given the other methods discussed above for arriving at a starting salary, perhaps the days of asking the question are best left behind.

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