

Asking for Salary Histories May Land You in Hot Water

Inequality with regard to workplace compensation still exists in our society. We have seen study after study showing how this disparity plays out for women and other minority groups within the U.S. since the inception of our society. The 2015 Census Bureau data showed that women are still making 79.6 cents on the dollar compared to men. These discriminatory practices have been coined the “gender gap” and “the glass ceiling” for decades. The fact that these phrases are part of our corporate lexicon 70 years after Rosie fastened her first rivet highlights the need for more aggressive action.

The dialogue is not new. What is new is the fact that some jurisdictions are aiming to get to the root of the issue. Massachusetts, New York City, Philadelphia and Puerto Rico are the first to have penned and passed laws to try to get this matter sorted out for good. As of this whitepaper, twenty other jurisdictions are in the process of introducing similar legislation.

Overview of Philadelphia’s Legislation

The [Philadelphia Wage History Ordinance](#) restricts private employers in Philadelphia from obtaining wage history information for individuals they may wish to hire. Of course, this imposes difficulties for many human resources (HR) managers attempting to offer a reasonable salary to potential employees.

- Prevents employers from taking retaliatory action against any applicant that does not wish to sign a wage history inquiry.
- Threatens court action against employers that do not follow the ordinance
- Provides a cause of action for prospective employees against employers in violation of the Ordinance and provides for damages,

This has been integrated into the Philadelphia Fair Practices Ordinance, which does not define the limits of the employers that might be covered under its provisions. As it stands, an “employer” is defined as:

“Any person who does business in the city of Philadelphia through employees or who employs one or more employees exclusive of parents, spouse, life partner or children, including any public agency or authority; any agency, authority or other instrumentality of the commonwealth; and the city, its departments, boards and commissions.”

Unfortunately, this fails to specify whether it’s limited to employers within Philadelphia, or if it applies to employers who have their principal offices outside of state, yet recruit and do business within Philadelphia. Anticipate seeing some litigation in this area in the near future. To ensure that your company is not named as a defendant, avoid asking for wage histories from any prospective employee located within Philadelphia.

Massachusetts Pay Equity Act

The [Massachusetts Pay Equity Act](#) was signed on August 1, 2016 and will take effect in 2018. It attempts to close the gender gap between the difference in pay between men and women for comparable work. The Act also:

- Broadens the 1945 Equal Pay Act and requires courts to redefine comparable work as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions”
- Bars employers from demanding pay secrecy
- Prohibits retaliation against employees for exercising their rights

New York City's Legislation

A **similar bill** was also passed by the New York City Council, stating that employers cannot research the former salary history of an applicant unless that applicant offers the information. The New York City bill covers a similar set of potential issues for human resource managers wanting to inquire about a prospective employee's wage history. Here are some things to keep in mind:

Researching salary history

In addition to being prohibited from contacting a candidate's former employer(s) regarding their pay history, HR managers cannot search public records for salary history. Furthermore, any other benefits or compensation collected by the applicant cannot be examined.

Using salary history as a basis of determining salary offer

Salary history cannot be used to gauge the employee's potential compensation for work from a prospective employer. This means that benefits and other types of salary histories cannot be considered. It's only if the candidate voluntarily agrees to disclose such information can HR managers then use the information to determine compensation.

Discussing salary

Details of a job offer along with its compensation can be discussed by the employer and candidate. The employer may choose to disclose the potential salary of the position, and the candidate can share his or her salary expectations.



The Puerto Rico Equal Pay Act

Act 16 was modeled after the Equal Pay Act but further limits an employer's ability to inquire about past salary, bans pay secrecy practices and provides remedies and "self-evaluation mitigation" for employers who have made a good faith effort to eliminate the pay inequality. Key provisions include:

- Employers can only request previous pay information after an offer has been made to the candidate.
- Employers are precluded from insiting on pay s secrecy. With limited exceptions from managers and HR professionals, the law provides protection for employees to disclose their own salaries with others, participate in any investigation, make a complaint, or present a claim without retaliation.
- Available remedies involve back wages and an equal amount in punitive damages - also referred to as double compensatory damages. Uniform guidelines are currently being developed by the Puerto Rico Secretary of Labor.



Similar Bans in Other Jurisdictions

California attempted to pass a salary history inquiry ban, but it was vetoed by the governor. However, a bill was ultimately signed, making it illegal to justify pay disparities using prior salary alone.

Similar bills in New Jersey, Virginia and Washington D.C. have also failed. The state of Washington recently passed a bill through the legislative committee that prohibits employers from inquiring about a prospective employee's salary history before an offer is made.

What Does the Federal Government Have to Say About All of This?

Since the enactment of the Equal Opportunity Employment of the Equal Pay Act in 1963, discrimination based on gender has been prohibited. With regard to gender identity in particular, the [Equal Opportunity Employment Commission \(EEOC\)](#) states that "An employment policy or practice that applies to everyone can be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business."

While Congress attempted to pass a salary history ban at the federal level, the "[Pay Equity for All Act of 2016](#)" died in committee.

On the surface, basing salary offers on pay history may seem harmless. However, in this context asking for salary history from prospective employees automatically creates disparate impact on all minority classes that have faced pay discrimination previously. When an individual's pay history has been substantially less than that of a similarly qualified member of the opposite sex for decades, this method fails.

What Should You Do?

In light of all of this new legislation and proposed federal legislation aimed at strengthening the [Equal Pay Act of 1963](#), employers need to take steps to improve their hiring practices. In all likelihood, it will eventually become illegal to inquire about wage history in any state prior to making an offer to a prospective employee.

National organizations with operations and workforce not bound by geographic lines will be impacted the most. For example, a corporation based in one state may have positions posted in another state with dissimilar laws, making the application process tricky. If the employer amends only the application for the out-of-state applicants, there is the risk of discrimination complaints. Candidates from “pay privacy” states are passed over in favor of applicants in “pay disclosure” states, which is often the case for remote positions.



An organization’s ability to identify specific job descriptions and their relative worth to the organization is the key to success in light of this legislation trend. Take, for example, a janitor in New York City who has the same job description as a maintenance engineer in Lubbock, Texas. Should the two have the same pay rate? It’s important to note that the cost of living is much higher in New York City than it is in Lubbock. Therefore, it doesn’t make sense to compensate the employees equally despite the same type and amount of work done.

To address this issue, a pay matrix helps to determine employee compensation rate in different areas by taking into account the type of work, relative worth to the company, and the cost of living in those areas. Having guidelines associated with pay matrices in place can help to close the gap in pay disparity.

HR Manager Action Steps

In light of the recently passed legislation and pending bills, now is the time for HR managers to engage in retooling applications and have high level discussions to assess the organization's current approach and identify where their systems are vulnerable to discrimination complaints. Here are a few steps we've outlined to help you get started"

Step1: Review and Revise Hiring Policies

Policies and procedures should be reviewed on an annual basis and any time a new law has been enacted that affects your practices. In this case, new policy and procedure subject manager should include the following:

- Modification of existing applications that request prior salary history
- Elimination of discussions in interviews, informal chats and any other pre-offer communications
- Implementation of market research tactics that don't violate the law
- Specific exclusion of investigating public profiles, social media and other sites that are designed to provide salary information
- Documentation procedures to address when applicants voluntarily disclose salary history



Step 2: Communicate With Your Organization

Once a decision is made on a course of action, it's important to communicate new policies clearly to applicants and current employees with regard to how the business is in compliance with Federal, State and Local laws in this realm.

All HR professionals should understand the new requirements under these laws to avoid claims from applicants that an unlawful attempt to obtain salary history. Pay history should be treated similarly to other EEOC protected disclosures.

Step 3: Train Appropriate Staff

Anyone involved in the hiring process needs to learn and understand new hiring practices. Recruiters, managers, directors, and executive staff need to know how to comply with these laws and understand the consequences of violating the law.

Step 4: Stay Up-to-Date on All Legislative Updates in the States You Operate

Change is the only constant in the ever-evolving world in which we live. The duty of human resources is to stay informed and make policy changes to comply with the employment laws and is not a task for the timid.

Ensuring that you hire the best possible employees takes considerable time, effort and skill. Making the most of the resources available to you is essential to making quality hires. Let Pre-employ help you through the process.

Interested in learning more?

If you still have questions or would like an evaluation of your current hiring policies and procedures, contact Pre-employ for a [free consultation](#). We want to help you get on the right path to successful hiring.

About Pre-employ

Headquartered in Northern California, Pre-employ is a national leader in the screening industry. For more than 20 years, Pre-employ has provided cost-effective solutions that deliver quality employee background screening services, industry best practices, and valuable resources to help minimize risk and enhance the hiring process. For two years in a row, Pre-employ was named to Business News Daily's Best Background Check Services.

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