

## California's Ban on Salary History Inquiries: New Law Brings Changes to the Job Application and Hiring Process

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Many employers commonly ask applicants for their salary history as part of the job application process. Employers will also often rely upon an applicant's salary history to determine or negotiate compensation for a job offer. However, the practice of relying on salary history has been called into question by policy analysts and equal pay advocates. The theory and concern is that such reliance perpetuates existing pay differences for women and minorities that historically have been underpaid relative to other groups.

To address this concern, on October 12, 2017, Governor Jerry Brown signed into law a new statewide salary privacy bill ([A.B. 168](#)), which adds section 432.5 to the California Labor Code and takes effect on **January 1, 2018**. The new law prohibits employers from asking for a job applicant's salary history and from relying upon that history unless it is voluntarily provided. The enactment is part of a growing national trend to restrict or ban reliance on salary history in an effort to erase historical discriminatory pay discrepancies. California now joins a growing list of states, territories, and municipalities that have recently passed similar laws, including Delaware, Oregon, Puerto Rico, San Francisco, and, as we previously reported, [Massachusetts](#), [New York City](#), and [Philadelphia](#).<sup>1</sup> Many other proposed laws are pending across the country, including at the federal level with the "Pay Equity for All Act of 2017," which was introduced in the House of Representatives on May 11, 2017.<sup>2</sup>

### What the New Law Provides

Beginning on January 1, 2018, all private and public-sector California employers—including national and international companies operating in California with California employees—can no longer request an applicant's "salary history information." Salary history information includes both "compensation and benefits" (but is not defined further under the statute).

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<sup>1</sup> Philadelphia's law is enacted, but its enforcement has been stayed pending the outcome of an ongoing legal challenge.

<sup>2</sup> States with pending legislation restricting salary history inquiries include Georgia, Iowa, Nebraska, New Hampshire, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin.

Under the new law, **California employers MUST NOT:**

- rely upon a job applicant's salary history information as a factor in determining whether to offer the applicant employment (unless such information is publicly disclosable);
- rely upon a job applicant's salary history information as a factor in determining the salary for the applicant (unless the information is voluntarily provided or subject to public disclosure by law); and
- seek salary history information about an applicant, whether orally or in writing, or personally or through an agent.

In addition, **California employers MUST**, upon reasonable request, provide an applicant with a pay scale for the job position sought.

The new law does not define "reasonable request" or "pay scale." Subject to further guidance from the California Legislature, administrative agencies, or the courts, it would appear for now that the statute leaves it to employers to determine the particulars of the "pay scale" for each job position that is subject to a request, be it a range, specific wage or salary level, compensation formula, or something else.

With respect to the term "seek," although the new law does not define this term either, an employer should not (i) ask the applicant directly for his or her salary history information, (ii) include queries or places to fill in such information on job application forms, (iii) contact an applicant's current or prior employer to inquire about compensation or benefits, (iv) request an applicant's salary history through headhunters, or (v) conduct other searches for an applicant's salary history information.

The new law provides that a violation will not constitute a misdemeanor under the applicable section of the California Labor Code, and it does not specifically provide for any penalty or other remedy for non-compliance. However, as the January 1, 2018, effective date draws closer, further guidance from the California Legislature and administrative agencies may be received as to the potential means of enforcement, including whether the new law will be interpreted to be covered by other statutes that impose penalties against employers for the violation of its provisions.

## **Exceptions**

The new law includes exceptions for the following:

- **Voluntary Disclosure:** An employer is not prohibited from receiving salary history information that the applicant voluntarily provides. If an applicant "voluntarily and without prompting" discloses his or her salary history information, the prospective employer may rely upon that information in *determining the*

*applicant's compensation and other benefits.* However, the employer may not consider that information in determining whether or not **to hire** the individual.

- **Salary History Information Available Under Federal or State Disclosure Laws:** The new law states that it does not apply to salary history information that is disclosable to the public pursuant to federal or state law, such as the California Public Records Act and the federal Freedom of Information Act.

In addition, employers should be aware of the following:

- **New Law Doesn't Change Labor Code Section 1197.5:** Even with its exceptions for voluntary disclosure by an applicant and salary information that publicly disclosable, the new law expressly states that it does not change the rule set forth in California's Equal Pay Act (Labor Code section 1197.5), which does not allow an employer to rely solely upon prior salary history to justify any disparity in compensation. The California Equal Pay Act generally prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex or another race or ethnicity for substantially similar work.
- **Uncertainty Exists Regarding Applicants' Salary Expectations:** The new law does not expressly prohibit employers from asking applicants about their salary expectations, i.e., how much they would like to be paid. However, unlike New York City's law, which expressly allows employers to initiate discussions regarding the applicant's salary expectations, the California law is silent on this issue. Thus, the permissibility of such inquiries is not entirely clear, and employers will have to wait and hope for further clarifying guidance as to this issue.

### **Additional Considerations for San Francisco Employers**

In addition to the new statewide law, private and public employers who are required to be registered to do business in the city of San Francisco must also comply with that city's salary history inquiry ordinance. The San Francisco ordinance takes effect **July 1, 2018**.

The San Francisco ordinance is similar to the statewide law, prohibiting employers from seeking or relying upon salary history, but it also includes the following additional restrictions and affirmative requirements:

- Employers cannot release a current or former employee's salary history to a prospective employer without the written authorization of the employee (unless the salary history is publicly available).
- Employers cannot disfavor, injure, refuse to hire, or retaliate against any applicant for not disclosing his or her salary history.

- Employers must post a notice prepared by the San Francisco Office of Labor Standards Enforcement (“OLSE”) (informing employees and applicants of their rights under the ordinance) in a conspicuous place at all workplaces, job sites, and locations within the city of San Francisco under the employer’s control and frequently visited by their employees or applicants. In addition, an employer must provide that notice to each labor union or worker representative with which the employer has an agreement or understanding.

Similar to the California law, the San Francisco ordinance allows employers to consider an applicant’s salary history when determining salary if the applicant voluntarily discloses such information without prompting, or gives the employer written authorization to inquire about salary history from a current or former employer.

### **What Employers Should Do Now**

To ensure compliance with the new bans on salary history inquiries, California employers, including San Francisco employers, should consider:

- removing any requests or spaces for salary history information in employment applications, background check forms, and any other forms or policies used in the hiring process;
- reviewing interview and pre-hire screening practices and policies to eliminate questions about salary history information;
- training human resources staff, internal recruiters, hiring managers, and any other individuals involved in the hiring process (i.e., those conducting interviews or setting compensation levels at the organization) on the requirements of the new law, as well as how to respond to requests for pay scale information and how to document voluntary disclosure of salary history information by an applicant;
- preparing a pay scale for open job positions to have this ready to provide to applicants upon reasonable request and identifying the factors (such as training, education and experience, provided that they are required for the position) that will determine where within the applicable range an offer will be made;
- coordinating with any outside background-checking vendors to ensure that background check forms and vendors do not request salary history when confirming prior employment, etc.;
- coordinating with external recruiters and headhunters to make sure that they will not provide applicant’s salary compensation history;
- ensuring that any disclosure of salary history is done on a purely voluntary basis (and without prompting), keeping in mind that it is not permissible to pose a

question about an applicant's salary history with a caveat that answering the question is not mandatory;

- if an applicant voluntarily discloses salary history information at any point during the hiring process, creating a "memo to file" (or other internal documentation) noting that the applicant voluntarily disclosed this information without prompting and describing the circumstances surrounding such disclosure;
- considering amending contracts with third-party vendors, such as headhunters, recruiters, and search and placement firms, to:
  - place the vendor on notice of its obligations under the new law,
  - require the vendor to agree that it will comply with the new law, and
  - provide for indemnification for claims made against you based on the vendor's actual or alleged violation of the new law;
- if you are required to be registered to do business in the city of San Francisco, obtaining and posting the OLSE's salary history inquiry ban notice;
- to the extent that your organization operates in locations outside of California, deciding whether (for administrative ease or public policy reasons) the organization will comply with the California law nationwide,<sup>3</sup> and, if so, taking all of the above steps in all of the organization's U.S. locations; and
- if your organization operates in multiple jurisdictions, making sure that electronic onboarding and other tools do not inadvertently continue to ask for (or store) salary history information for applicants seeking job positions in California.

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<sup>3</sup> Note: A uniform practice nationwide may make compliance within California more likely.

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