

Expanded Illinois Equal Pay Law with Ban on Salary History Inquiries Takes Effect Sept. 29

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In 2017 and 2018, Illinois lawmakers tried twice to close the gender pay gap by prohibiting employers from seeking information about an applicant's salary history and expanding existing pay equity protections. Both attempts were vetoed by former Governor Rauner. Proving that the third time's the charm, the state legislature passed the measure on July 31, 2019, and Governor Pritzker recently signed the bill into law, proclaiming that "[h]ere in Illinois, we know that women get the job done. It's time to pay them accordingly."

Thus, effective September 29, 2019, [Public Act 101-0177](#) ("Law"), which amends the Illinois Equal Pay Act of 2003 ("2003 Act") and applies to all employers, will (i) prohibit employers from seeking salary history information; (ii) bar employers from requiring employees to waive their rights to request, discuss, or disclose salary information; and (iii) strengthen the 2003 Act's equal pay provisions.

Illinois now joins 13 other states (including [New York](#), [New Jersey](#), and [Connecticut](#)) and nine other localities, plus Puerto Rico, in prohibiting private employers from inquiring into and/or relying on an applicant's pay history. The Law also continues a growing trend among states in recent years (including 2019) to enact or expand other pay equity protections for job applicants and employees, such as significantly lowering the burden on plaintiffs to establish a successful equal pay claim.

The Ban on Salary History Inquiries

Under the Law, employers, employment agencies, and any agents thereof may not:

1. screen job applicants based on their current or prior salary by requiring that applicants meet certain minimum or maximum salary thresholds;
2. require applicants to provide salary history information as a condition of employment, or as a condition of being considered for employment, considered for an interview, or considered for a job offer;

3. seek salary history information from an applicant's current or past employer (but may do so with respect to current employees applying for an internal position); or
4. discharge, or discriminate against, any individual because that person refuses to comply with a salary history request.

The Law specifically permits employers to (i) provide information concerning the compensation and benefits for the particular position for which the applicant is applying, and (ii) engage in a discussion with the applicant about his or her salary expectations. Further, an employer will not run afoul of the Law if a job applicant voluntarily discloses his or her current or prior salary history. The employer may not, however, consider or rely on this information when deciding whether to make a job offer, setting wages and benefits for the job applicant, or determining the applicant's future compensation.

Employers may seek an applicant's salary history information that is available through public records, but the Law does not address if (as with such volunteered information) an employer is barred from relying on that data in determining whether to offer the applicant a job or a particular salary.

An employer that violates the Law may be liable to an injured party for (i) compensatory damages; (ii) special damages not to exceed \$10,000; (iii) appropriate injunctive relief; and (iv) costs and reasonable attorneys' fees. Offenders also may incur fines.

Restrictions Regarding Wage Transparency

The 2003 Act prohibited employers from discriminating or retaliating against an employee for inquiring about, disclosing, comparing, or discussing his or her wages or the wages of other employees. These wage transparency prohibitions have now been expanded by the Law, which bars employers from requiring employees to sign a contract or a waiver that prevents them from disclosing or discussing information about their wages, salary, benefits, or other compensation. However, employers may forbid human resource professionals, supervisors, or other individuals who are privy to employee compensation by virtue of their job duties from disclosing such information without obtaining the employee's consent.

Protections Regarding Equal Pay

Prior to the new Law, the 2003 Act prohibited pay discrimination on the basis of sex or status as an African American and required "equal pay for equal work." The Law substantially lowers that standard to "equal pay for substantially similar work." Thus, a protected employee now needs to prove only that he or she was paid less than an employee of the opposite sex (or, if African American, a non-African American), for the same or substantially similar work on a job, the performance of which requires *substantially similar* (rather than equal) "skill, effort and responsibility, and which... [is] performed under similar working conditions."

Under the 2003 Act, a pay differential was permitted if it was based on (i) a seniority system, (ii) a merit system, (iii) a difference in quantity or quality of production, or (iv) any other factor other than sex or a factor that would constitute unlawful discrimination

under the Illinois Human Rights Act. Under the new Law, if an employer relies on the fourth exception, the factor:

- must not be based on or derived from a differential in compensation based on *sex or another protected characteristic*,
- must be job-related and consistent with a business necessity, and
- must account for the differential.

An employee who establishes an equal pay violation may recover any underpayment owed, with interest; compensatory damages (if the employer acted with malice or reckless indifference); punitive damages; injunctive relief; and costs and reasonable attorneys' fees.

What Illinois Employers Should Do Now

With respect to the salary history ban, employers should do the following:

- Remove questions about salary history from employment applications, background check forms, and any other applicable forms or policies used during the hiring process.
- Coordinate with any outside background-checking vendors to ensure that background check forms do not request salary history and that a vendor does not request salary history when confirming prior employment. Consider amending contracts with a vendor to:
 - place the vendor on notice of its obligations under the Law,
 - require the vendor to agree that it will comply with the Law, and
 - provide for indemnification for claims made against you based on the vendor's violation of the Law.
- Confirm that external recruiters and headhunters will comply with the salary history ban when seeking applicants for jobs in Illinois.
- Train 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 Law's requirements, including the ban on making salary history inquiries *and* relying on such information in job and salary offer decisions, even if the information is voluntarily disclosed by the applicant.

Also instruct staff on the interviewer's right to discuss the salary range and benefits for the open position, as well as the applicant's salary and benefits expectations. To this point, it is a best practice that interviewers explicitly state

that the inquiry pertains only to the applicant's *expectations* for the given position, and not to his or her current or past salary.

- If an applicant voluntarily discloses salary history information at any point during the hiring process, inform the applicant that such information will not be considered in determining whether the applicant receives a job offer or the salary offered, and create a "memo to file" (or other internal documentation) noting that the applicant voluntarily disclosed this information and the circumstances surrounding the disclosure.

With respect to the new equal pay provisions, employers should do the following:

- Review pay practices and make any necessary changes to ensure that any wage differentials among substantially similar jobs are based on objective, nondiscriminatory factors, such as those discussed herein.
- Until the courts have had an opportunity to weigh in on the new standard, take a conservative approach to identifying those jobs that are "substantially similar."

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