

## Legislative Trends: Pay Equity & Inquiries

SEPTEMBER 14, 2017

State and local lawmakers across the country have been busy proposing new pay equity bills. Aimed at reducing the gender wage disparity, recent pay transparency and equity legislative measures prohibit employers from inquiring about candidates' salary history. Proponents of the laws argue that such a ban will thwart the perpetuation of the gender pay gap—which some say stands at around 20 percent—negate implicit biases that create wage inequities, and result in employers basing salary on the role itself. As the patchwork of pay inquiry laws continues to emerge in cities and states across the country, employers should pay close attention to how these new laws impact their hiring practices. The fates of recent pay inquiry measures are detailed below.

### Enacted Legislation

#### Oregon

On June 1, Oregon Governor Kate Brown signed the [Oregon Equal Pay Act of 2017](#), expanding the law's existing protection against pay inequities. The Act's amendments include provisions barring employers from screening job applicants based on current or past compensation, and from determining compensation for a position based on current or past compensation of a prospective employee. The Act further prohibits employers from seeking the salary history of an applicant or employee, with the exception that an employer may request, after obtaining written authorization, an applicant to verify prior compensation after the employer has made a job offer that includes the proposed amount of compensation. While the provision of the Act prohibiting employers from seeking prospective employees' salary histories goes into effect October 6, 2017, the ability to file a civil action will not go into effect until January 1, 2024. The Act's remaining provisions take effect January 1, 2019.

#### Delaware

On June 14, Delaware Governor John Carney signed into law [H.B. 1](#), otherwise known as An Act to Amend Title 19 of the Delaware Code Relating to Unlawful Employment Practices, banning inquiries into salary history. The Delaware legislation prohibits employers from screening applicants based on their compensation history. While employers may not inquire into the compensation history of an applicant, applicants may voluntarily disclose such information. The Act further permits an employer and applicant to discuss and negotiate compensation expectations, so long as the employer does not affirmatively seek compensation history in the course of such discussions and negotiations. Moreover, an employer may seek and confirm an applicant's compensation history once an offer of employment with

terms of compensation has been extended to and accepted by the applicant. Individuals will have all rights and relief already afforded to them under Title 19, including a right to file a civil action after administrative exhaustion, and the recovery of compensatory and punitive damages and costs and fees. This legislation will take effect on December 14, 2017.

### **Puerto Rico**

On March 8, 2017, Governor Ricardo Rosselló signed Act 16, the Puerto Rico Equal Pay Act. The Act bars employers from inquiring into an applicant's salary history, unless the applicant volunteers such information, or the applicant has received an offer of employment with a set salary, in which case an employer can corroborate salary history. The Act further prevents employers from prohibiting discussions about salaries among employees or applicants, with certain narrow exceptions for human resources, managerial, and supervisory personnel. While the Act is effective immediately, its penalty provisions do not go into effect until March 8, 2018.

### **New York City**

On May 4, Mayor Bill de Blasio signed wage equity bill Int. No. 1253-A into law. The Ordinance amends the New York City Human Rights Law to prohibit New York City employers from inquiring into the salary history of a job applicant or from relying upon an applicant's salary history when making compensation decisions during the hiring process. Employers may, without inquiring about salary history, engage in a discussion with the applicant about their expectations with respect to salary. Notably, employers may verify and take into account an applicant's salary history if he or she "voluntarily and without prompting" discloses his or her salary history to an employer. The Ordinance goes into effect October 31, 2017. See [New York City Bans Salary History Inquiries](#) for further information.

### **San Francisco**

On July 19, San Francisco Mayor Ed Lee signed the [Parity in Pay Ordinance](#). The Ordinance makes it unlawful for San Francisco employers to ask about or rely on an applicant's pay history during the hiring process, when making job offers, and when setting the salaries of new hires. In addition, the Ordinance prohibits employers from disclosing the salary histories of former and current employees to prospective employers without first obtaining written authorization, except in limited circumstances. Where an applicant voluntarily discloses his or her salary history, employers may consider and verify such information. The Ordinance, which becomes effective July 1, 2018, is more prohibitive than California state law, which currently prohibits employers from relying exclusively on prior salary when making compensation decisions. See [San Francisco Enacts Ordinance Banning Pay History Inquiries](#) for further information.

For other related legislation, please see our previous client briefings, [Massachusetts Passes New Pay Equity Law](#) and [California Employment Legislative Update](#).

## **Legislative Hurdles**

### **Challenges in Philadelphia**

On January 23, Mayor Jim Kenney signed [Bill No. 160840](#) into law, which made Philadelphia the first major city in the country to enact an ordinance prohibiting employers from inquiring into or relying upon the salary history of applicants unless voluntarily disclosed. See [Philadelphia Enacts Ordinance Banning Pay History Inquiry](#). Although originally scheduled to take effect on May 23, the Philadelphia Chamber of Commerce filed a lawsuit challenging the Ordinance, alleging that it violates the First Amendment rights of its members. On May 30, U.S. District Court Judge Mitchell Goldberg dismissed the suit, but allowed the Chamber leave to file an amended complaint. Judge Goldberg opined that the Chamber lacked standing to challenge the Ordinance and that it must identify an impacted business before it could bring such a suit. On June 16, the Chamber refiled its lawsuit and reasserted its request for a preliminary injunction to block enforcement of the Ordinance. According to a city spokesman, the city will continue to delay implementation of the Ordinance pending the court's ruling.

In addition to judicial attacks, the Philadelphia Ordinance may face state legislative hurdles. On February 7, the Pennsylvania Senate amended [S.B. 241](#), the Equal Pay Law, to preempt local ordinances concerning the subject matter of the bill, which includes provisions about pay discrimination and salary discussions. If passed, the bill may invalidate the Philadelphia pay inquiry ordinance.

## **Showdown in New Jersey**

The New Jersey legislature recently passed [A3480](#) to amend the state's Law Against Discrimination to prohibit employers from inquiring about an applicant's salary history or past benefits. Employers would also be barred from screening applicants based on their wage history or relying on an applicant's salary history at any stage in the hiring process. Employers would be permitted to seek the salary history of an applicant if the applicant voluntarily provided a written authorization. On July 31, Governor Chris Christie vetoed the bill, stating that it "would punish, as discriminatory, otherwise innocuous conduct done with neither discriminatory intent nor a discriminatory impact." A two-thirds majority of each house of the New Jersey legislature is required to override Governor Christie's veto.

## **Illinois Legislation Halted**

On May 10, Illinois lawmakers passed an amendment to the Equal Pay Act, H.B. 2462, which would prohibit employers from screening applicants based on their salary history, conditioning an interview or offer on disclosure of their salary history, or seeking salary history from the applicant's current or former employer. On August 25, Governor Bruce Rauner vetoed the bill, stating that while he supports the effort to eliminate the gender wage gap, he believes Illinois should model its legislation after Massachusetts law, which allows employers to seek pay history after they have offered a candidate a job and salary. A two-thirds majority of each house of the Illinois legislature is required to override Governor Rauner's veto.

## **Maine Legislature Falters**

On July 20, the Maine legislature failed to override Governor Paul LePage's veto of LD 1259, An Act Regarding Pay Equality. Had it been enacted, the legislation would have prohibited employers from inquiring about an applicant's prior salary, and would have permitted employees to discuss wages without facing disciplinary action or retaliation.

Similar bills banning salary history inquiries have also been introduced in [Virginia](#) and [Maryland](#), but have stalled. In addition, a bill barring local governments from adopting legislation regulating information employers may request or require during the interview process has been introduced in the Michigan Senate.

# **Proposed Legislation**

## **New York**

On June 21, the New York State Assembly voted in favor of Assembly Bill A2040C, which if passed, would amend the New York Labor Law and limit inquiries into and about a job candidate's salary history. As proposed, the bill would prohibit employers from relying on the salary history of an applicant in determining his or her wages; seeking, requesting, or requiring the salary history from an applicant as a condition of interviewing, employment, or promotion; and refusing to interview, hire, promote, or otherwise employ an applicant based on his or her prior salary history. The bill is currently before the New York State Senate, which has adjourned for the 2017 legislative session.

## **Washington**

The Washington State Legislature is currently considering HB 1533, which would prohibit employers from seeking the salary history of an applicant from the applicant or a current or former employer or requiring that an applicant's prior salary history meet certain criteria. The bill would allow employers to confirm an applicant's salary history if the applicant voluntarily disclosed his or her salary history or if an offer of employment with compensation has been extended to the applicant. The bill is pending in committee.

## **North Carolina**

The North Carolina Equal Pay Act, NC S537, is currently pending in committee. That bill, as advanced, would prohibit discrimination in pay on the basis of gender and would make it unlawful for an employer to prohibit employee discussions about wages, screen job applicants based upon their salary histories, or seek the salary history of any prospective employee from any current or former employer prior to extending an offer.

## **Berkeley, California**

The Berkeley City Council in California requested draft legislation barring salary inquiries and separately providing preferential treatment to contractors who engage in equal pay practices.

Bills have also been introduced by the California, [Connecticut](#), [Wisconsin](#), [Texas](#), and [Rhode Island](#) legislatures in recent sessions. Similarly, the [Pay Equity for All Act of 2017](#) has been reintroduced in the United States Congress by its original sponsors. All are currently in committee or otherwise pending.

## Guidance

With the substantial amount of legislation being introduced throughout the country, employers should monitor how state and local laws impact their recruiting and hiring practices. Employers should promptly audit and review their recruitment and hiring processes, including job postings, applications, policies, and procedures, to ensure they do not include salary disclosure requirements or inquiries concerning salary history. It is further essential that employers educate and train recruiters and managers on how to comply with any new legislation during interviews and when extending offers. In addition, recruitment and hiring personnel should be instructed to consider the role, job responsibilities, skills, and experience, along with current market rates and a candidate’s job expectations, when setting salary. Human resources will also need to confirm that third-party companies in charge of background checks and screenings are complying with new laws. Given the patchwork of different laws across multiple jurisdictions, it may be prudent for nationwide employers to develop uniform procedures that simultaneously comply with all applicable requirements.

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