

Salary History Ban Laws: What You Can and Cannot Ask

Prepared by:
Martha J. Keon and William J. Simmons
Little Mendelson, P.C.

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Salary History Ban Laws: What You Can And Cannot Ask

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I. LAWS ENACTED TO DATE

As of June 1, 2019 the following jurisdictions have passed laws containing some version of a salary history ban:

- California (and also specifically in San Francisco, CA)
- Colorado
- Connecticut
- Delaware
- Hawaii
- Maine (effective 9/17/19)
- Massachusetts
- Kansas City, MO
- The following localities in New York:
 - New York City, NY
 - Albany County, NY
 - Suffolk County, NY (effective 6/30/19)
 - Westchester County, NY (will automatically sunset if New York passes a statewide law)
- Cincinnati, OH (effective 3/12/20)
- Oregon
- Puerto Rico
- Philadelphia, PA (partially enjoined by *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. April 30, 2018) (motion for

preliminary injunction granted in part); stay of effective date remains in place “until further notice.” (Docket No. 102, June 29, 2018)).

- Vermont
- Washington (effective 7/28/19)

II. GENERAL PROHIBITIONS

Generally speaking, each jurisdiction bans “inquiries” of any kind by an employer to an applicant about his or her prior compensation at another job, whether the inquiries occur in writing such as on a job application, or verbally such as an interview. All of the jurisdictions except for Albany County, Westchester County, and Suffolk County in New York, Kansas City, Missouri and Cincinnati, Ohio apply to employers of all sizes.¹ The laws typically define the off-limits compensation information broadly, to include not just hourly rate of pay or annual salary but also “benefits” and all other forms of compensation the applicant may have received.

The laws also typically explicitly ban reliance on any prior compensation information of the applicant in screening applicants, deciding whether to make a job offer to the applicant or setting the initial salary offer for the applicant. And, generally speaking, an employer cannot use other means such as agents, employment agencies or other intermediaries to try to circumvent the prohibitions.

Although the purpose of salary history ban laws is often expressed (where a purpose is stated in the statutory text or where legislators have commented on the laws) as a means to help correct historical imbalances of pay between men and women, the text of all of the laws is neutral as to gender and other protected characteristics. Thus, for example, it is just as impermissible to ask a man for prior compensation history as it is to ask a woman. There is also no general “good faith” exception built into the text any of the laws (for instance, where an employer claims that the employer wanted to obtain the compensation history information to potentially offer to pay the candidate *more*, rather than *less*). The upshot is that now that these laws have been enacted, it is important for employers to pay attention to the *actual text* of the passed laws and not just the originally-expressed “spirit” that motivated the creation of the laws.

¹ The Albany County, Westchester County, and Suffolk County laws apply to employers of 4 or more employees. The Kansas City law applies to employers of 6 or more employees. Cincinnati’s law applies to employers of 15 or more employees.

Several jurisdictions expressly permit asking about an applicant's salary expectations. The remaining jurisdictions are silent on the issue, and if asking an applicant about salary expectations in these jurisdictions, employers must take care to avoid prompting an applicant to volunteer salary history information.

III. VOLUNTARY PAY DISCLOSURES BY APPLICANTS

Many of the jurisdictions include an exception to their salary history bans where the applicant chooses to “voluntarily” disclose salary history to the employer, presumably to attempt to negotiate a higher rate of pay.² However, the jurisdictions vary on whether or how they define such a voluntary disclosure and also vary as to the effect of such a voluntary disclosure:

California: If an applicant “voluntarily” and “without prompting” discloses salary history information to a prospective employer, the statute does not prohibit the employer from considering or relying on the voluntarily disclosed salary history information in determining the salary for that applicant. Cal. Lab. Code § 432.3(g), (h).

San Francisco, CA: If an applicant discloses his or her salary history “voluntarily” and “without prompting” or provides written authorization for release of his or her salary history, an employer may consider the applicant’s salary history to determine the applicant’s salary or verify the applicant’s salary history. San Francisco Police Code § 3300J.4(e), (f).

Connecticut: The statute only creates an exception to the general prohibition against salary history inquiries if the prospective employee has “voluntarily” disclosed such information. Conn. Gen. Stat. § 31-40z(a)(5). It does not expressly say that the information can then be used to set pay.

Hawaii: If an applicant “voluntarily” and without “prompting” discloses his or her salary history, the employer may consider salary history in determining salary, benefits, and other compensation for the applicant, and may verify the applicant’s salary history. Haw. Rev. Stat. § 378-2.4.

Maine: If an employee or prospective employee has “voluntarily” disclosed compensation history information without “prompting,” the employer or employment agency may seek to confirm or permit a

² Colorado, Delaware, Albany County, and Suffolk County do not have any provisions expressly addressing voluntary disclosures by applicants.

prospective employee to confirm such information prior to an offer of employment. Me. Stat. tit. 5, § 4577.

Massachusetts: If an applicant has voluntarily disclosed his or her prior wage or salary information, the employer may confirm the applicant's prior wages or salary or permit the applicant to confirm prior wages or salary. Mass. Gen. Laws ch. 149, § 105A(c)(2). The Massachusetts Office of the Attorney General has opined that information will qualify as "voluntarily disclosed" if a reasonable person in the prospective employee's position would not think, based on the employer's words or actions, that the employer suggested or encouraged the disclosure.

Kansas City: The prohibition on salary history inquiries does not apply where an applicant has, "voluntarily" and without "prompting," disclosed the applicant's salary history information. Kansas City Code of Ordinances § 38-102.

New York City: If an applicant "voluntarily" and without "prompting" discloses salary history to an employer, the employer may consider salary history in determining the applicant's salary, benefits and other compensation, and may verify the applicant's salary history. N.Y.C. Admin. Code § 8-107(25)(d). The New York Commission on Human Rights has opined that a disclosure of salary history is "without prompting" if the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions.

Westchester County: An employer may rely on wage or salary history if the prospective employee voluntarily provides it in order to support a higher wage than that offered by the employer. Westchester Cty., N.Y. Code of Ordinances § 700.03(9).

Cincinnati: An employer may consider an applicant's salary history if the applicant made a "voluntary" and "unprompted" disclosure of the salary history information. Cincinnati Muni. Code § 804-03.

Oregon: The "unsolicited" disclosure of a job applicant's current or past compensation by a job applicant, employee or a current or former employer of the applicant or employee that is not considered by an employer does not constitute a violation of the statute. Or. Admin. R. 839-008-0005(3).

Philadelphia: (currently stayed). An employer can rely on a

prospective employee's wage history if the prospective employee "knowingly and willingly" disclosed his or her wage history to the employer. Philadelphia Code § 9-1131(2)(a)(ii). "Knowingly and willingly" means the prospective employee has disclosed his or her wage history voluntarily, not in response to a question from an interviewer, and knows or has been informed that the employer may use the disclosure to determine the compensation to offer. Philadelphia Commission on Human Relations Regulation No. 7.3.

Puerto Rico: If an applicant voluntarily disclosed his or her current salary or salary history information, the potential employer may confirm the applicant's salary or salary history or allow the applicant for employment to confirm such information. Puerto Rico Law No. 16 (March 8, 2017) art. 4(a)(1).

Vermont: If a prospective employee "voluntarily" discloses information about his or her current or past compensation, an employer may, after making an offer of employment with compensation to the prospective employee, seek to confirm or request that the prospective employee confirm that information. Vt. Stat. Ann. tit. 21, § 495m(b).

Washington: An employer may confirm an applicant's wage or salary history if the applicant has "voluntarily" disclosed his or her wage or salary history. Washington HB 1696 (2019).

As set forth above, since many of the jurisdictions either do not define with certainty what constitutes a fully "voluntary" disclosure or otherwise mandate that the employer cannot "prompt" such a disclosure, employers must exercise caution in taking any actions or making any statements that would suggest a preference that an applicant disclose the off-limits information or could be perceived as applying pressure to the applicant to disclose the information. When a truly voluntary disclosure occurs, employers may also want to consider documenting the fact that a voluntary disclosure happened to have a contemporaneous record in the event of later litigation in which an applicant claims that he or she was forced to provide salary history information.

IV. MANDATED PAY DISCLOSURES BY EMPLOYERS

A new trend in salary history ban laws is to not just prohibit employers from seeking applicants' salary history information but to also affirmatively require employers to disclose certain salary information about the job. The following is a summary of jurisdictions

that have enacted “mandatory disclosure” provisions in their salary history ban laws:

California: Upon “reasonable request,” an employer must provide the pay scale for a position to an applicant applying for employment. “Pay scale” means a salary or hourly wage range. “Reasonable request” means a request made after an applicant has completed an initial interview with the employer. Cal. Lab. Code § 432.3(c).

Colorado: An employer must disclose the hourly or salary compensation, or a range of the hourly or salary compensation, for every posting of every job opening, plus a general description of the benefits and other compensation to be offered to the hired applicant. Colo. Rev. Stat. § 8-5-201.

Cincinnati: An employer, upon reasonable request, must provide the pay scale for a position to an applicant who has received a conditional offer of employment for the position from the employer. Cincinnati Muni. Code § 804-03.

Washington: Upon an applicant’s request and after the employer has initially offered the applicant the position, an employer of 15 or more employees must provide the minimum wage or salary for the position for which the applicant is applying. Likewise, upon request of an employee who has been offered a promotion or an internal transfer to a new position, such employers must provide the wage scale or salary range for the employee’s new position. If no wage scale or salary range exists, the employer must provide the minimum wage or salary expectation set by the employer prior to posting the position, making a position transfer, or making the promotion. Washington HB 1696 (2019).

V. POST-OFFER INQUIRIES

Employers often ask whether it is permissible to inquire about compensation history, or verify compensation history *after* an offer has already been made. For instance, if an applicant negotiates a higher rate of pay for the job offer, can the employer then confirm that the applicant was truthful in the negotiations after an offer is made? Some of the jurisdictions have addressed this issue to a point, as set forth below:

Delaware: The statute does not prohibit an employer from seeking an applicant’s compensation history after an offer of employment with terms of compensation has been extended to the

applicant and accepted, for the sole purpose of confirming the applicant's compensation history. Del. Code Ann. tit. 19, § 709B(e).

Maine: After the employer makes an offer of employment that includes all terms of compensation, the employer may inquire about or confirm the prospective employee's compensation history. Me. Stat. tit. 5, § 4577; Me. Stat. tit. 26, § 628-A.

Massachusetts: A prospective employer may seek or confirm a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee. Mass. Gen. Laws ch. 149, § 105A(c)(2).

Albany County: A job applicant may provide written authorization to a prospective employer or employment agency to confirm prior wages, including benefits or other compensation or salary history, only after any offer of employment with compensation has been made to the job applicant. Albany County, NY Local Law No. 1 for 2000 (Omnibus Human Rights Law for Albany County) as amended by Local Law No. P for 2016 § 7(1)(i).

Westchester County: An employer may seek to confirm a prospective employee's prior wage information only after extending an offer of employment with compensation to the prospective employee, and the prospective employee responds to the offer by providing wage information to support a higher wage than that offered by the employer. The employer must obtain the prospective employee's written authorization to seek his or her prior wage information. Westchester Cty., N.Y. Code of Ordinances § 700.03(9).

Oregon: The statute does not prevent an employer from requesting from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes an amount of compensation. Or. Rev. Stat. § 659A.357..

Puerto Rico: If the employer negotiated compensation with the applicant and made an offer of employment to the applicant, the employer may ask or inquire or confirm the applicant's wage or salary history. Puerto Rico Law No. 16 (March 8, 2017) art. 4(a)(2).

Washington: An employer may confirm an applicant's wage or salary history after the employer has negotiated and made an offer of employment with compensation to the applicant. Washington HB 1696 (2019).

VI. PENALTIES

The laws that have been passed to date also vary as to whether they explicitly provide for penalties for violations and, if so, the amount of the penalties. For example:

California: No express penalty provisions, except that Labor Code section 433 (making certain employer actions related to employment applications a misdemeanor) does not apply. Cal. Lab. Code § 432.3.

San Francisco: Beginning July 1, 2019, the OLSE may impose a penalty payable to the city of up to \$100 for each applicant or employee that was the subject of the violation. A second violation within 12 months incurs a \$200 penalty, and additional violations incur a penalty of \$500. San Francisco Police Code § 3300J.6.

Colorado: In the case of a willful violation, the court may award liquidated damages equal to the amount of the employee's economic damages. Colo. Rev. Stat. § 8-5-104.

Connecticut: No express penalty provisions.

Delaware: Violations of the statute incur a civil penalty of not less than \$1,000 nor more than \$5,000 for the first offense and not less than \$5,000 nor more than \$10,000 for each subsequent violation. For penalty purposes, any actions that violate the provisions that pertain to interviewing and hiring for a single position shall constitute a single violation. A civil penalty claim may be filed in any court of competent jurisdiction. Del. Code Ann. tit. 19, § 709B(h).

Hawaii: No express penalty provisions.

Maine: An employer that violates the equal pay and compensation history provisions is subject to a forfeiture between \$100 and \$500 for each violation. Me. Stat. tit. 26, § 626-A.

Massachusetts: An employer in violation of the equal pay statute incurs a penalty of up to \$1,000. Mass. Gen. Laws ch. 149, § 105B.

Kansas City: An employer that engages in a prohibited discriminatory practice is guilty of an ordinance violation, punishable by a fine of not more than \$500.00, by imprisonment of not more than

180 days, or by such fine and imprisonment. Kansas City Code of Ordinances § 38-101.

New York City: No express penalty provisions.

Albany County: No express penalty provisions.

Suffolk County: No express penalty provisions.

Westchester County: No express penalty provisions.

Cincinnati: No express penalty provisions.

Oregon: No express penalty provisions.

Philadelphia (currently stayed): No express penalty provisions.

Puerto Rico: An employee may recover as damages the amount of wages not received, up to the total amount of his/her corresponding salary, plus an equal amount as additional penalty. Puerto Rico Law No. 16 (March 8, 2017) art. 5.

Vermont: A court may award penalties of up to \$10,000 to the State of Vermont or an aggrieved employee for violations of the Fair Employment Practices Act. Vt. Stat. Ann. tit. 21, § 495b; Vt. Stat. Ann. tit. 9, § 2461.

Washington: Employers that violate the equal pay provisions commit a misdemeanor. When punishment for a misdemeanor is not prescribed by law, the punishment is imprisonment up to 90 days, a fine up to \$1,000, or both. Wash. Rev. Code §§ 49.58.020, 49.58.060.

Employers should note that because so many of these laws were passed so recently, employers must continue to stay apprised of any related developments such as amendments to the laws adding penalty provisions or courts or administrative agencies reading the right to penalties into the laws from other more general remedial provisions.

VII. SUMMARY

As discussed in the presentation, there are many other differences and nuances in the salary history ban laws that have been passed to date. Employers who operate in any of the affected jurisdictions should review the actual statutory text and any associated

regulations or FAQs in detail to determine the exact risks and potential exclusions in each jurisdiction before finalizing a compliance approach and should consult with their legal counsel.

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