

Pay Equity Legislation

The National Trend Continues



October 2017

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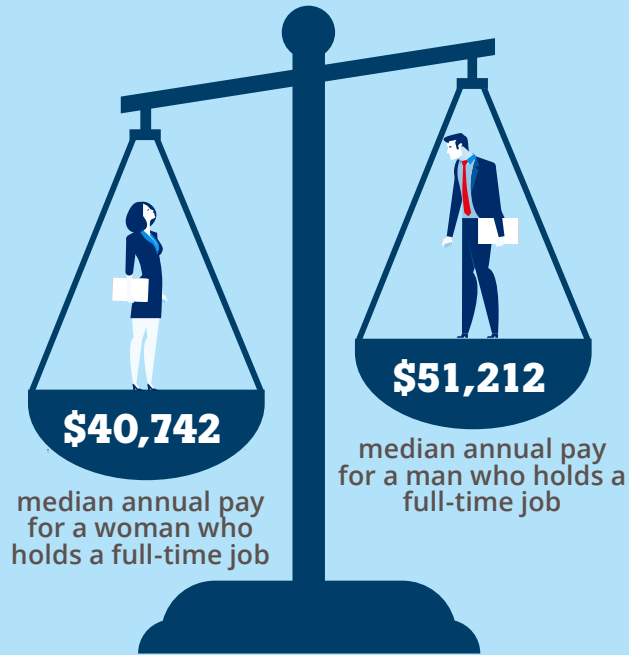


Being asked about current or previous salary during an interview tends to make most candidates uncomfortable. If the candidate responds with a salary too high for the organization's budget, he or she may be eliminated from the competition. Stating a low salary may allow the organization to low-ball the candidate.

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However, many U.S. cities, states and territories are considering measures that would bar employers from asking job candidates about their prior salary. Delaware, New York City, Philadelphia, Puerto Rico, Oregon, San Francisco, and Massachusetts have already taken steps to prohibit employers from asking about a candidate's salary history.

An Underlying Issue



Black women
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The reasoning behind this new legislation actually stems from wage inequality. According to the [U.S. Census](#), the median annual pay for a woman who holds a full-time job year-round is \$40,742, while the median annual pay for a man who holds a full-time, year-round job is \$51,212. And the disparity can be even greater for women of color. For example, among women who hold full-time jobs in the U.S., Black women are typically paid 63 cents and Latinas are paid just 54 cents for every dollar paid to white, non-Hispanic men.

Victoria Budson, executive director of the Women and Public Policy Program at Harvard University's Kennedy School, [noted](#) that since research has shown that women start out with a lower salary, it is quite likely that they will make increasingly less when employers base future salaries on that first lower salary. "When you peg your offer and salary based on what someone's made in their last employment, you then replicate whatever discrimination people have faced in prior jobs."

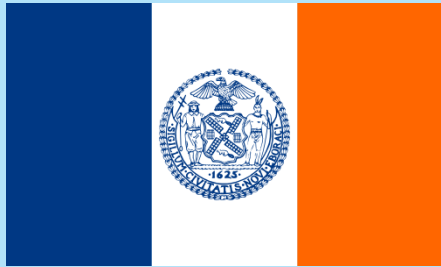
In other words, if an employer bases a salary on what has been paid before, women who have historically been paid less than men merely based on their gender may continue to lag behind for the entire length of their careers, not only in salary but in merit increases as well.

As a result, some states and cities throughout the United States are contemplating – or are already – adopting laws that aim to close the wage gap by prohibiting questions about previous salary.

Here's a look at cities and states within the U.S. that have already begun to take action.



New York City



Int. 1253–A prohibits employers from asking about a job candidate’s salary history during all stages of the employment process.

In New York City, Int. 1253–A was approved by the New York City Council on April 5, 2017, and signed into law by Mayor Bill de Blasio on May 4th. Int. 1253–A prohibits employers from asking about a job candidate’s salary history during all stages of the employment process. It also prohibits an employer from relying on a candidate’s salary history when determining that candidate’s salary amount, including when negotiating a contract.

It also prohibits asking a candidate’s current or previous employer about the candidate’s salary history, or searching public records for salary history information.

However, if a job candidate voluntarily and without prompting provides his or her salary history, the prospective employer can use this information to determine the salary, benefits, and other compensation, and the employer may verify the salary history. Also, the law does not prohibit the employer and candidate from discussing the salary and other benefits being offered.

The Bill does not apply to:

- New York City employers acting pursuant to any federal, state or local law authorizing the disclosure or verification of salary history or requiring knowledge of salary history for employment purposes.
- Current employees applying for an internal promotion or transfer.
- Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established in collective bargaining.

And if a company violates this law? It may face a civil penalty of up to \$125,000 for an unintentional violation, and up to \$250,000 for a “willful, wanton or malicious act.” And an individual may bring a civil lawsuit for violations of the new law.

The New York City bill is scheduled to go into effect on October 31, 2017.

Massachusetts



Businesses may not ask a candidate or a current or previous employer about wage or salary history until after negotiation.

Massachusetts passed their Pay Equity law in August 2016, although the measure does not go into effect until summer 2018. A business may not ask a candidate or a current or previous employer about wage or salary history until after negotiation, and cannot require that a prospective employee's prior wage or salary history meet certain criteria.

Massachusetts actually has had an equal pay law on the books since 1945, but its equal pay standard has been narrowly interpreted by the courts, according to [Amanda Baer](#), an attorney with Mirick O'Connell in Westborough, Mass.

The Act to Establish Pay Equity (AEPE) specifies that employers may not:

- Require that an employee refrain from inquiring about, discussing or disclosing information about the employee's own wages, or any other employee's wages.
- Screen job applicants based on their wages.
- Request or require an applicant to disclose prior wages or salary history.
- Seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment—including proposed compensation—has been made.

AEPE basically requires a plaintiff to show "unequal pay for equal work," according to [Mark Burak](#), an attorney with the Boston firm of Ogletree Deakins. The new law will considerably broaden that standard.

If a job candidate "voluntarily disclosed" his or her salary, the business may confirm it and may confirm history after an offer of employment with compensation has been negotiated and made to the prospective employee.

Unlike other employment-related laws that offer short time-frames during which an individual can file a claim, and must first go through a potentially lengthy administrative process in order to find relief before the claim can be heard in court, the Massachusetts law accelerates the process; the statute of limitations is three years, and individuals can bring their claim to court immediately.

Puerto Rico



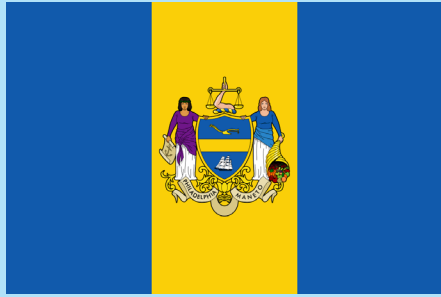
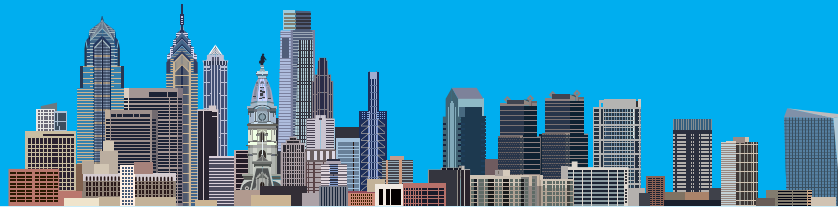
Similar to the Massachusetts law, under PREPA employers may not make direct inquiries about salary history to job applicants, nor conduct public record searches to ascertain salary information.

After Puerto Rico Governor Ricardo Rosselló signed the “Labor Transformation and Flexibility Act” (House Bill 453) in January 2017, which ushered in sweeping reform in Puerto Rican employment laws, Rosselló in March signed Act 16 – the “Puerto Rico Equal Pay Act” (commonly known as “The Act” or “PREPA”). Although the Act went into effect immediately, employers will not be held liable for violations until a year after its enactment, which allows them to establish self-evaluation programs and corrective measures described in the Act.

Similar to the Massachusetts law, under PREPA employers may not make direct inquiries about salary history to job applicants, nor conduct public record searches to ascertain salary information.

PREPA provides for a civil cause of action against employers that violate the Act. Employees may recover the amount of wages due plus an additional penalty in an equal amount, plus costs, reasonable attorney fees, and expenses. An employer that dismisses, threatens, discriminates or retaliates against an employee in violation of the Act will be liable for twice the amount of damages that the violation causes the employee. Beyond a civil suit, an employee who feels an employer violated the Act may also file complaints with the secretary of the Puerto Rico Department of Labor and Human Resources, who may investigate and adjudicate claims of alleged violations of PREPA.

Philadelphia



The city became the first municipality in America to pass a law prohibiting employers from asking job candidates about his or her salary background, although the Chamber of Commerce filed a complaint naming several businesses that would be adversely affected by the law. As of this writing, the stay remains in effect.

The City of Brotherly Love became the first municipality in America to pass a law prohibiting employers from asking job candidates about his or her salary background, although the move has brought about formidable legal challenges.

The City Council had passed the [Wage Equity Ordinance](#) (“WEO”) on December 8, 2016, citing the wage inequality statistics referenced above. Mayor Jim Kenney signed the WEO January 23, 2017.

The law was scheduled to go into effect on May 23, 2017, but on April 6, 2017, the Chamber of Commerce for Greater Philadelphia filed a federal lawsuit challenging the law on numerous grounds. On April 19, 2017, the United States District Court for the Eastern District of Pennsylvania entered a stipulated order that stayed the effective date of the WEO until resolution of the motion for preliminary injunction.

The United States District Court for the Eastern District of Pennsylvania dismissed the challenge to the Philadelphia ordinance on May 30, 2017, based upon the Chamber of Commerce for Greater Philadelphia’s alleged failure to show it has standing to bring the lawsuit.

On June 13, 2017, however, the Chamber filed an amended complaint that named several businesses that would be adversely affected by the WEO. As of this writing, the stay remains in effect.

The Bill would make it unlawful for an employer, employment agency or their employees and agents to:

- Require disclosure of, or inquire about (by asking in writing or otherwise), a prospective employee’s wage history;
- Condition employment or consideration for an interview or employment on disclosure of wage history;
- Retaliate against a prospective employee for failing to comply with any wage history inquiry or for otherwise opposing any act made unlawful by this chapter; or
- Rely on the wage history of a prospective employee from any current or former employer of the individual in determining the wages for such individual at any stage in the employment process, including the negotiation or drafting of any employment contract, unless such applicant knowingly and willingly disclosed his or her wage history to the employer, employment agency, employee or agent thereof.

There is also a provision stating that any action taken by an employer or employment agency or their employee or agents “pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of wage history for employment purposes” will be deemed not to violate the WEO.

Job candidates who believe an employer has broken the law can file a complaint within 300 days with the city’s Commission on Human Relations, which would have the ability to fine employers \$2,000 and order them to pay other damages, including the applicant’s legal fees.

Delaware



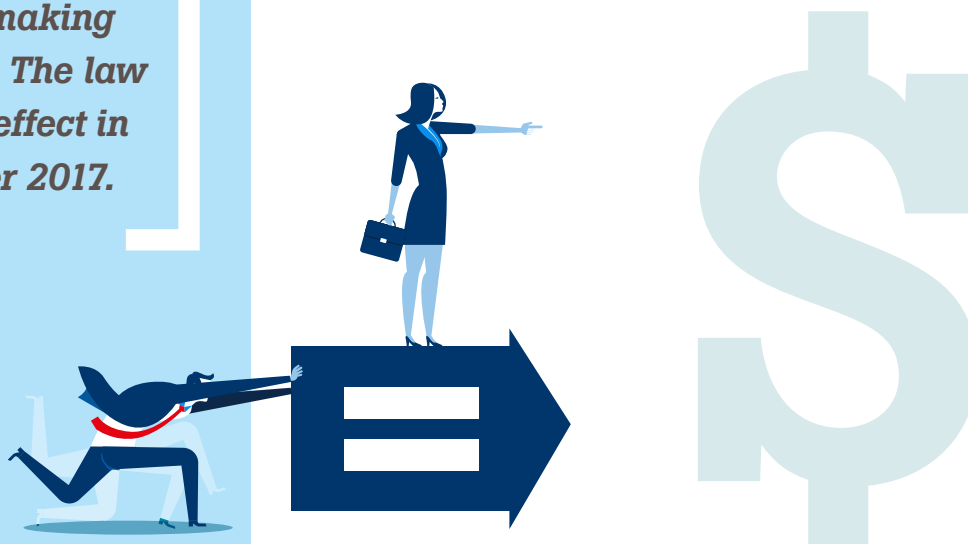
H.B. 1 was passed June 14, 2017, barring employers from asking candidates about their salary history prior to making a job offer. The law will take effect in December 2017.

On June 14, 2017, Delaware Governor John Carney signed into law H.B. 1, banning employers from asking job applicants about their salary history. The law is slated to take effect in December 2017, just six months from its passage.

Delaware's H.B. 1 makes it unlawful for an employer to seek the pay history of a job candidate prior to making a job offer. The information may not be asked of the candidate or his or her current or previous employer, except under narrow circumstances. The prospective employer also may not screen a candidate based on his or her salary where prior compensation must fall within specified minimum or maximum figures.

After an employment offer has been made and accepted, and compensation terms have been specified, the employer may then confirm salary history information.

Penalties for violations range from \$1,000 to \$5,000 for a first offense, and up to \$10,000 for a subsequent offense. The law does not specifically prohibit employers from considering salary history when setting compensation, if applicants voluntarily disclose that history.



San Francisco



The City by the Bay's bill would include city government agencies from inquiring about a candidate's salary, however, if salary information is available online, employers may look it up.

In "The City by the Bay," women earn 84 cents for every dollar a male counterpart earns (compared to the national average of 79 cents). On April 4, 2017 (Equal Pay Day), Supervisor Mark Farrell proposed to the Board of Supervisors a "Parity in Pay Ordinance" that would ban employers in San Francisco from looking at past wages when determining salaries for new job applicants. It would also prohibit employers from asking prior employers how much an applicant made at his or her last job without their expressed consent.

The bill would be broader than other acts as it would include San Francisco City Government from inquiring about a candidate's current or previous salary, however, if salary information is available online, as it is for city employees, employers may look it up.

According to [San Francisco Weekly](#), the California state legislature passed a similar measure in 2015, but it was vetoed by Governor Jerry Brown, who felt there wasn't enough evidence supporting its effectiveness. (Brown did, however, sign one of the toughest pay parity laws in the nation in 2015, stipulating that employers could not pay women less than men for doing similar jobs. California's Fair Pay Act prohibits employers from using an employee's prior salary as the **sole** basis to justify a pay disparity. California does NOT ban employer inquiries into an applicant's prior salary.)

Seeing as San Francisco has adopted new pay equity laws, it could serve as valid justification to review the 2015 statewide proposal.

The San Francisco Ordinance was passed on July 19, 2017. It prohibits employers from asking job candidates about their current or past salary or considering a candidate's salary information in determining whether to hire a candidate or what salary to offer. The ordinance also prohibits employers from disclosing a current or former employee's salary history without that employee's authorization, unless the salary history is publicly available. The new requirements take effect July 1, 2018.



The Oregon law is unique. It provides a very inclusive definition of “protected class.” In addition to prohibiting pay discrimination based on gender, race, national origin or color, it also includes religion, sexual orientation, marital status, veteran status, disability or age.

On June 1 2017, Oregon Governor, Kate Brown, signed House Bill 2005 (also known as the Oregon Equal Pay Act of 2017), which may be the country’s broadest pay equity law. It bans not only questions about prior salary but expands pay equity to more protected classes.

The Oregon law prohibits paying wages in a way that discriminates against a member of a protected class. This includes compensation “to any employee at a rate greater than which the employer pays wages or other compensation to employees of a protected class for work of comparable character,” unless the difference is:

- Based on a bona fide factor
- Related to the position in question
- Based on these specific factors stated in the law:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production, including piece-rate work
- Workplace locations
- Travel, if travel is necessary and regular for the employee
- Education
- Training
- Experience
- Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential

Under Oregon’s law, employers cannot screen job candidates based on current or past compensation or determine compensation for a position based on the current or past compensation of the candidate. Employers may not request this information from the candidate’s current or former employer.

However, the employer may confirm prior compensation after the employer makes an offer of employment that includes an amount of compensation, as long as prior authorization is obtained.

The Oregon law is unique. It provides a very inclusive definition of “protected class.” In addition to prohibiting pay discrimination based on gender, race, national origin or color, it also includes religion, sexual orientation, marital status, veteran status, disability or age. According to [Seyfarth Shaw](#), a law firm specializing in labor and employment, “The impact of this expansion, especially were it to expand to other jurisdictions, cannot be overstated.”

The law, including the discrimination provisions, becomes effective on January 1, 2019. The salary history ban will be effective by October, 2017. However, a private right of action for violations of the salary history ban does not go into effect until January 1, 2024.



CALIFORNIA REPUBLIC

The law is part of a package of bills that are “paving the way for a better, more inclusive, healthier California.”

On October 12, 2017, California enacted a pay history ban that prohibits all California employers from directly or indirectly inquiring about a job candidate’s pay history or benefits for determining a job offer or prospective salary.

At a signing ceremony, Governor Jerry Brown announced that the law is part of a package of bills that are “paving the way for a better, more inclusive, healthier California.”

The new law applies to all candidates for employment but is specifically designed to counteract salary discrimination which can affect a female employee from her first job throughout her career.

The new measure does not prohibit discussions concerning pay expectations, and stipulates that job candidates may volunteer information on prior pay and benefits. If the candidate elects to do so, the prospective employer may consider that information when formulating a compensation package, but prohibits employers from relying upon that information to justify disproportional pay. The law also states that, if requested by a job candidate, an employer must provide a pay scale for the job offered.

On October 6, 2015, Brown had signed the California Fair Pay Act, which strengthened California’s Equal Pay Act. It prohibited an employer from “paying any of its employees wage rates that are less than what it pays employees of the opposite sex, or of another race, or of another ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”



California’s salary privacy bill will take effect on January 1, 2018.

Tips to Help Plan for the New Laws



There's no question that the pay equity train has left the station and has many more stops to make. Employers can expect pay equity legislation to be a major focus for the 2018 legislative season. Even as legislators are winding down their 2017 law-making activities, more than a dozen pay equity laws are still under consideration. It is not too early to start to plan.

Speak with your legal counsel for a discussion of your compliance responsibilities under the coming pay equity measures. Share what you learn with your recruiters, hiring managers and other relevant stakeholders in your organization.

Employers hiring in pay equity jurisdictions should review their job application forms in order to ensure any questions pertaining to previous or current salary are removed, or may consider instituting a process change to stop asking the question altogether. The same goes with interview processes – is there really value to ask about prior pay?

Employee handbooks, notices, policies and practices may also need to be updated. Finally, and most importantly, engage your legal counsel for a discussion of your compliance responsibilities under the myriad of pay equity measures and socialize what you learn with your recruiters, hiring managers and other relevant stakeholders in your organization.

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