

# Pay Equity Legislation

The National Trend Continues




July 2018

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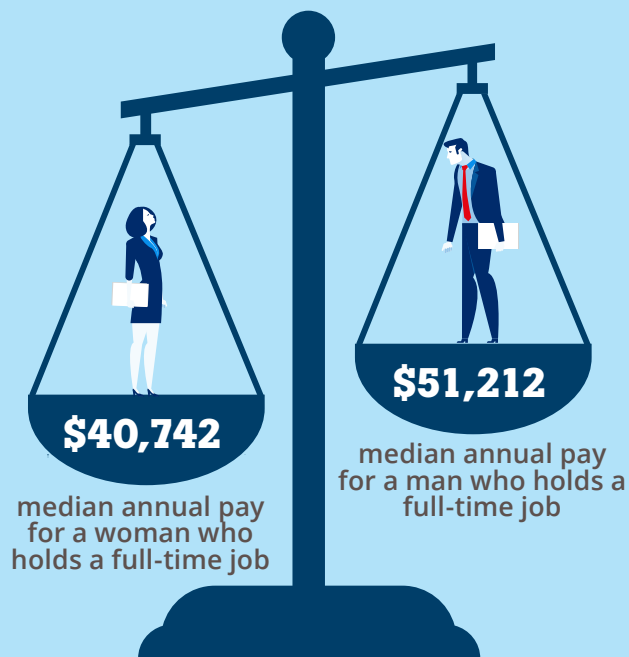


Being asked about current or previous salary during an interview tends to make most candidates uncomfortable. If the candidate responds with a salary too high for the organization's budget, he or she may be eliminated from the competition. Stating a low salary may allow the organization to low-ball the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



*This year many U.S. cities, states and territories are considering measures that would bar employers from asking job candidates about their prior salary.*

# An Underlying Issue



Black women  
are typically paid  
**63 cents** and  
Latinas are paid  
just **54 cents**  
for every dollar paid  
to white, non-  
Hispanic men.

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.



# Albany County, NY



***The law prohibits all Albany County employers with four or more employees from screening applicants based on their current or prior wages;***

In October 2017, the Albany County Legislature voted to amend the Albany County Human Rights Law to prohibit employers from requiring job candidates to provide salary history before offering them employment. On November 6, 2017, the bill was signed into law and went into effect December 17, 2017.

The law prohibits all Albany County employers with four or more employees, and employment agencies, from:

- Screening applicants based on their current or prior wages or other compensation;
- Requiring that a job candidate's prior wages satisfy minimum or maximum criteria;
- Requesting or requiring that a candidate disclose salary history information as a condition of being interviewed or considered for employment;
- Seeking information about the current or prior salary of a candidate from his or her current or former employers.

Albany County's law contains one exception. An employer or employment agency may confirm a job candidate's previous compensation only after an offer of employment "with compensation" details is extended to the applicant, if the candidate provides written authorization.





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.

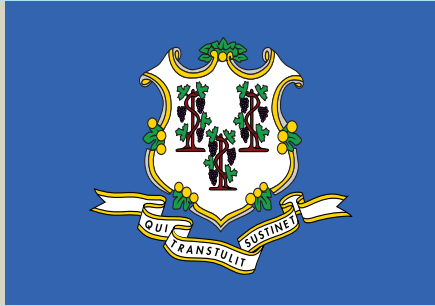
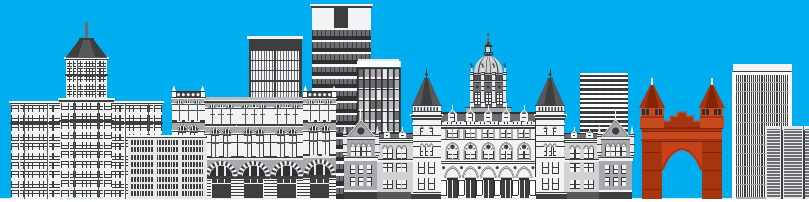
The new measure does not prohibit discussions concerning pay expectations, and stipulates that job candidates may volunteer information on prior pay and benefits. If the candidate elects to do so, the prospective employer may consider that information when formulating a compensation package, but prohibits 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 took effect on January 1, 2018.

# Connecticut



***Employers cannot require an applicant to disclose the value of his or her previous compensation under the revised Act.***

On May 22, 2018, Connecticut's Governor signed into law revisions to the state's pay equity law prohibiting salary inquiry, which becomes effective on January 1, 2019.

The new act provides the following new protections for candidates:

- Candidates may not be asked about past wages and compensation histories at any point during the hiring process, although they may choose to volunteer such information.
- Candidates may be asked generally whether the previous employer had stock options or other equity incentives, but may not be asked to specify the value of such benefits.

The new Act also provides a private right of action for candidates to sue employers who violate any of these legal protections within two years of the alleged violation.



# Delaware



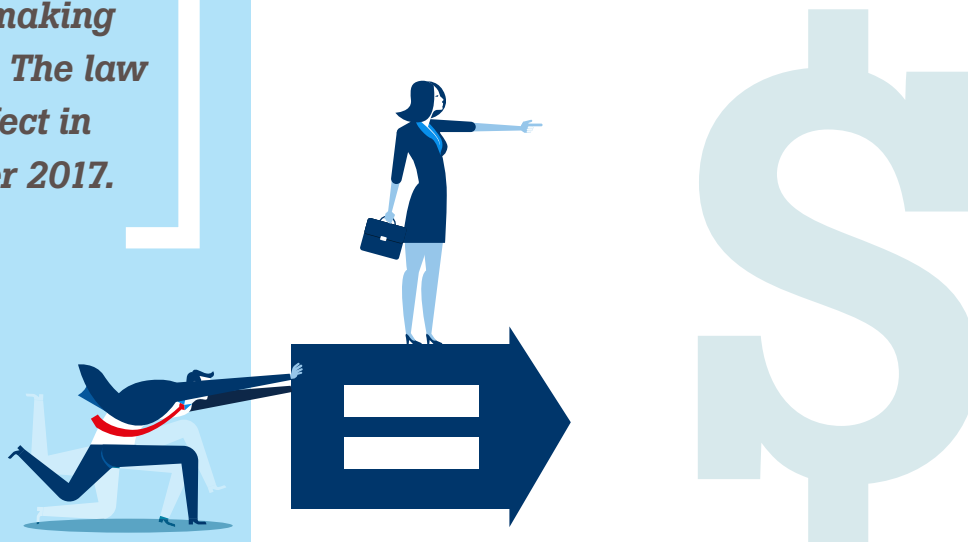
***H.B. 1 was passed June 14, 2017, barring employers from asking candidates about their salary history prior to making a job offer. The law took effect in December 2017.***

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 took effect December 2017, just six months after its passage.

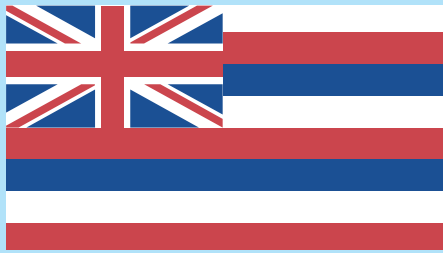
Delaware's H.B. 1 makes it unlawful for an employer to seek the pay history of a job candidate prior to making a job offer. The information may not be asked of the candidate or his or her current or previous employer, except under narrow circumstances. The prospective employer also may not screen a candidate 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.



# Hawaii



***Employers and their agents cannot require a candidate to disclose previous compensation, but the new law encourages wage transparency among employees.***

On July 5, 2018, Hawaii's Governor signed into law an equal pay act prohibiting salary inquiry, which becomes effective on January 1, 2019.

The new act bans employers and their agents from asking candidates about past wages and compensation histories at any point during the hiring process. Employers must not search publicly available records to ascertain a candidate's salary history. Candidates may choose to volunteer salary history, at which point an employer can consider the information in setting compensation for the job.

The new act does not bar discussions concerning salary expectations, and prevents employers from retaliating against employees who discuss or inquire about wages. The act also does not prohibit employers from verifying non-salary-related employment information via a background check, so long as any salary history information that disclosed is not relied upon by the employer in setting the candidate's compensation.





# 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. 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.

# New York City, NY



***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 took effect October 31, 2017.**



***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

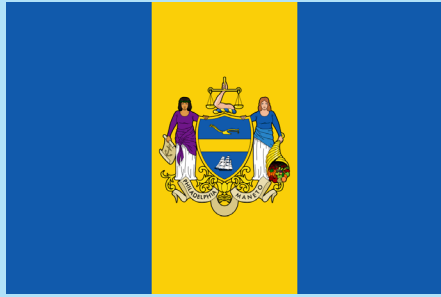
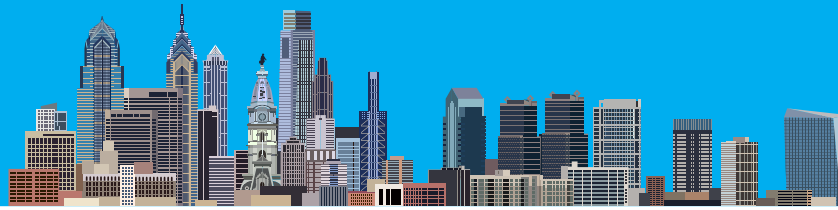
Under Oregon’s law, employers cannot screen job candidates based on current or past compensation or determine compensation for a position based on the current or past compensation of the candidate. Employers may not request this information from the candidate’s current or former employer.

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 took effect in October, 2017. However, a private right of action for violations of the salary history ban does not go into effect until January 1, 2024.

# Philadelphia, PA



***Employers are prohibited from relying on a candidate's compensation history in order to determine the candidate's future pay.***

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.

On April 30, 2018, the United States District Court for the Eastern District of Pennsylvania held that the portion of the Philadelphia Wage Equity Ordinance that prohibits employers from inquiring a job candidate’s compensation history is unconstitutional. However, the portion of the law that prohibits employers from relying on a job candidate’s compensation history in determining the wages for the candidate remains intact.



# 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.

# San Francisco, CA



***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.***

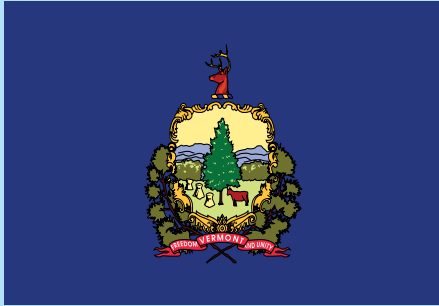
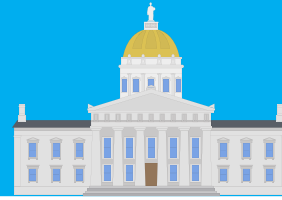
In "The City by the Bay," women earn 84 cents for every dollar a male counterpart earns (compared to the national average of 79 cents). On April 4, 2017 (Equal Pay Day), Supervisor Mark Farrell proposed to the Board of Supervisors a "Parity in Pay Ordinance" that would ban employers in San Francisco 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.



***Employers cannot require an applicant to disclose his or her salary and benefit history or seek an applicant's salary history without his or her authorization.***

On May 11, 2018, Vermont's Governor signed a broad salary history law, which will become effective on July 1, 2018.

The new law provides that employers shall not:

- Inquire about or seek information regarding a prospective employee's current or past compensation from either the prospective employee or a current or former employer of the prospective employee;
- Require that a prospective employee's current or past compensation satisfy minimum or maximum criteria; or
- Determine whether to interview a prospective employee based on the prospective employee's current or past compensation.

However, 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.





***Employers can verify past wages when authorized if the candidate is negotiating a higher salary.***

On April 10, 2018, Westchester County signed into law the Wage History Anti-Discrimination Law, which will become effective on July 9, 2018.

The new law, which applies to employers, labor organizations, employment agencies, licensing agencies, and the employees and agents of these entities, makes it unlawful to:

- Rely on a job candidate's wage history in determining his or her wages;
- Request or require disclosure of a job candidate's wage history as a condition of being interviewed, as a condition of being considered for an offer of employment, or as a condition of employment; or
- Refuse to hire or otherwise retaliate against an employee or job candidate because he or she opposed an act or practice prohibited by the law. Albany County's law contains one exception. An employer or employment agency may confirm a job candidate's previous compensation only after an offer of employment "with compensation" details is extended to the applicant, if the candidate provides written authorization.

However, If a job candidate voluntarily discloses prior wage information to justify a higher wage after receiving an offer of employment that specifies compensation, the employer may confirm the job candidate's prior wages upon written authorization for the inquiry.





# 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.

***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.

# About HireRight

HireRight delivers global background checks, drug testing, employment, and education verification services through an innovative platform to help companies hire the right candidates, so they can grow successfully, and efficiently—no matter their size or where they operate. HireRight offers extensive screening solutions that can be tailored to the unique needs of the organization, giving employers additional peace of mind about their people and vetting processes. HireRight's platform can be integrated with existing HR platforms, making it easy to use and giving candidates the best possible experience.

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Information current as of July 12, 2018.

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