

# Legislation Limiting an Employer's Ability to Inquire About and Consider Applicants' Prior Salary History Gains Momentum



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At the federal level, the Equal Pay Act and Title VII both address gender-based pay inequity; however, there is a growing sentiment that these protections do not go far enough in correcting and preventing pay inequity. The Paycheck Fairness Act, proposed federal legislation which seeks to extend those protections, has been introduced in Congress numerous times since 1997 but has never garnered enough support to pass. In the face of persistent gridlock on the federal level, states and increasingly cities have taken the lead in this realm and a number of jurisdictions have passed pay equity legislation that is more comprehensive than the federal protections in place. At present, California, New York, Maryland, and Massachusetts have the strongest protections written into their state laws.

One of the most controversial recent initiatives we are seeing is legislation that prohibits employers from inquiring about an applicant's salary history during the hiring process. Massachusetts, New York City, and Philadelphia are among the jurisdictions that have adopted such legislation.

## **Massachusetts**

The Massachusetts [law](#), which was the first of its kind, includes a provision banning employers from asking job applicants about salary history in order to avoid cumulative pay disparities. It does permit an employer to confirm prior salary history however, where the applicant has voluntarily disclosed such information to the employer or after the employer has made an offer to the applicant identifying a compensation package that it negotiated with the applicant. This prohibition seeks to address the problem of "carryover" pay discrimination that can accumulate throughout women's careers and goes into effect in the middle of 2018.

## **Philadelphia**

Earlier this year Philadelphia became the first city to enact a law prohibiting employers from seeking or requiring a prospective employee's wage history. Under the new law, employers and employment agencies are prohibited from inquiring about a prospective employee's wage history, requiring the disclosure of a prospective employee's wage history, or conditioning a prospective employee's employment or consideration for an interview on the disclosure of that person's wage history. The law also prohibits employers and employment agencies from relying on compensation information received from a prospective employee's current or former employer to determine that person's wages "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[.]" This law has recently become the subject of litigation as the Chamber of Commerce of Greater Philadelphia has announced that it will seek to block the law before it is scheduled to take effect on May 23, 2017. Stay tuned here for more updates on that.

## **New York City**

New York City followed shortly thereafter, adopting very similar protections earlier this month. The New York City [legislation](#) amends the City Human Rights Law and generally bans prior salary discussions, except in certain specific situations: (1) where an "applicant voluntarily and without prompting discloses [such] salary history"; (2) the employer "may, without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer"; and (3) to verify an applicant's voluntarily disclosed salary history. The ban applies "during the hiring process, including the negotiation of a contract." However, notably, it does not apply to applicants for promotion or internal transfer.

## **Takeaways:**

Employers should review their policies and procedures for compliance with state and local laws. Those who operate in jurisdictions that have adopted more stringent protections need to be vigilant about reviewing their compensation policies and their hiring practices, particularly in jurisdictions that have enacted a ban on salary history inquiries during the application process. Employers in those jurisdictions should consult with legal counsel to ensure that their application and hiring procedures comply with all applicable laws. They should also consider implementing training for human resources and related professionals who interface with applicants and employees regarding these issues. If you have any questions, please feel free to reach out to us.

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