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Asking: “How much do you currently make?” in 2018?

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Not in California. California law (A.B. 168) is the latest in a batch of state and local laws prohibiting employers from asking job candidates how much they currently or have made. It takes effect January 1. Candidates can voluntarily disclose their salary history and in that case the employer can use that information in setting initial compensation. Employers are also required to provide job candidates with a pay scale for the position upon request.

New York City’s pay history inquiry ban went into effect on October 31. Delaware’s on December 14. Massachusetts and Oregon will follow, on July 1, 2018 and January 1, 2019, respectively. 12 other states currently have bills pending that would ban the compensation history question.

California employers Google, Facebook, and Cisco have announced they will apply the compensation inquiry ban nationwide. They join Wells Fargo in taking that approach when the New York City ban went into effect on October 31. Such an approach makes practical sense for employers recruiting nationally, but is also showcased as a best practice by employers who want to demonstrate deliberate effort to address gender pay inequity.

In late November, the EEOC asked the U.S. Court of Appeals for the Ninth Circuit to appear at oral argument to support an Equal Pay Act claim, taking the position that allowing an employer to base someone’s pay on prior salary undermines the purpose of the law because it “institutionalizes” the gender pay disparity. *See, Rizo v. Yovino*, 9th Cir., No. 16-15372, November 27, 2017). Yet, on November 30, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment holding that an employer can validly rely on a promotional candidate’s salary history as long as the prior salary was not a product of bias. *See, Lauderdale v. Ill. Dept. of Human Services*, 7th Cir., No. 16-3830 (November 30, 2017).

What should an employer do now? Be mindful of the jurisdictions in which you do business and recruit. And the list of prohibited jurisdictions will continue to expand in 2018 – with Illinois likely to again consider the ban and Philadelphia’s ordinance tied up in court. Participation in and reliance upon lawfully conducted compensation surveys will become a more critical tool in setting pay ranges for open positions. None of these statutes prohibit asking a candidate: “What salary do you expect?” — okay to use as a reference point, but does that question meet the spirit of these laws?

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