

HR Daily Advisor

COMPENSATION, HR MANAGEMENT

Let's Talk About Sex ... and Salary History

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How often do we think about sex? When it comes to hiring and pay, perhaps we should more often.



(<http://news.blr.com/app/uploads/sites/3/2015/08/BM-equal.jpg>)

For 54 years, the Federal Equal Pay Act of 1963 has prohibited employers from discrimination in pay based on sex. Despite more than half a century, statistics continue to show that women receive approximately 80 cents for every dollar earned by men (see e.g. *The Simple Truth about the Gender Pay Gap*, American Association of University Women). Why is that? And what is to be done?

Let's first look at the law. Under the Equal Pay Act, an employer must pay a woman the same wages as a man for the same work, unless the pay disparity is due to: 1) a seniority system; 2) a merit based system; 3) a system that sets an employee's pay based on the quality or quantity of production; or 4) a difference based on a factor "other than sex." Are these exceptions so broad that they swallow the rule entirely?

Because of these statistics and the perceived lack of protection under the current law, state and local legislatures are currently taking a harder look at these pay disparities and attempting to find ways to close the gap. The current focus appears to be on barring employers from requesting salary history from applicants during the hiring process.

What's the reasoning behind these new prohibitions? If you assume a woman is currently earning less than her male counterpart, an employer that utilizes an applicant's salary history in setting the wage rate for a position will allegedly perpetuate this salary disparity. Employers may reason—"I can't give [female applicant] a 20% increase in salary even though it matches the departed male incumbent because it would be unfair to other employees."

As a result, the qualified female applicant is paid less, perhaps, than her market worth because of an inherent systemic issue which she can never overcome. The question then becomes—does this perpetuate sex discrimination?

Courts Wrestle with Employer Use of Salary History

Recently, the United States Court of Appeals for the 9th Circuit faced the question of whether a system that based an employee's starting wage on the employee's prior salary history could be a "factor other than sex." *Rizo v. Yovino et.al.* (April 2017). In the case, the employer set salary ranges for the position in question. A new employee was placed in a specific range based upon the individual's education and years of experience. However, once placed within a range, the employee's actual starting salary was fixed according to the individual's salary history.

The result in this case was a female employee with the same educational background and experience having assigned a starting salary less than her male coworker simply because she earned less at her former position. The plaintiff and the EEOC argued that use of prior salary alone can never comply with the Equal Pay Act as a "factor other than sex" because, in doing so, an employer perpetuates existing pay disparities which undermine the purpose of the Act.

The lower court agreed, concluding that when an employer bases its pay structure *exclusively* on salary history, a resulting pay difference between men and women is not defensible under the "factor other than sex" provision of the Equal Pay Act.

In April, a three judge panel of the 9th Circuit Court of Appeals reversed, finding that in limited circumstances, if the use of salary history "effectuates some business policy" and the employer used prior salary "reasonably in light of its stated purpose and other policies," it could be in compliance with the Equal Pay Act. The Court however recently decided to give the matter a closer look by granting *en banc* review.

The outcome of the case may affect how many employers conduct interviews for new hires. Many employers currently rely on salary histories during the hiring process for a variety of reasons. Some use them to screen out applicants whose salary expectations (based on their current salary) may be out of line with what is budgeted for the position. Others use salary histories as part of the salary negotiation process in order to be able to get a desired candidate at a lower cost.

States and Cities Already Taking Action to Ban Salary History Questions

In several states, we don't have to wait for the Court's opinion to determine whether relying on salary history is prohibited. California, Delaware, Massachusetts, Oregon, New York City, Philadelphia and Puerto Rico already have enacted legislation banning employers from seeking or relying on salary histories during the hiring process. Many others, including Pennsylvania, have legislation pending.

All of the statutes contain similar components which mandate that, during the application/interview process, employers are prohibited from asking questions designed to elicit salary history. After making an offer of employment, an employer may request salary history information for verification purposes only. Employers who violate the acts face the possibility of civil penalties and/or the risk of private discrimination lawsuits.

In New York City, employers are even prohibited from seeking the information from other sources, even if public. Employers are also prohibited from setting a new employee's salary based on the individual's salary history and from discriminating or retaliating against an individual who refuses to provide such information.

It is important to remember that, during the hiring process, employers generally *are* permitted to ask applicants their desired salary range or salary expectations. Employers can also request information on things like job performance history and production/sales numbers.

Employer Takeaways

As a female attorney who has worked in the employment and labor industry for over 20 years, I've seen first-hand disagreements over the reasons for the wage gap, but also over the ways it can or should be corrected. Certainly it remains to be seen if these salary history bans have their intended effect of closing the wage gap.

In the meantime, the following are a few practical tips for employers to promote fairness for everyone:

1. Consider whether to stop asking the question about salary history. Focus interview questions on prior job performance, duties, work-related experience and not ultimately on wages. If necessary, simply ask for salary expectations.
2. Set the rate of pay based on objective criteria and the value of position you are hiring for—not the person that ultimately fills the position.
3. Train your HR staff on what types of questions are/are not permitted.
4. Utilize the salary negotiation process as a way to garner trust and respect with your employees.



Renee Mattei Myers (<https://www.eckertseamans.com/our-people/renee-c-mattei-myers>) focuses her practice on a range of labor and employment matters in state and federal trial and appellate courts throughout Pennsylvania. She counsels a wide range of industries on matters including hiring, discipline and discharge, family and medical leave issues, wage and hour issues, and reductions-in-force. Myers has a leadership role in the PA Bar Association's Commission on Women in the Profession which advocates for professional advancement, mentoring and networking opportunities for female attorneys.