

# Caution: Ban Ahead - The Rise in Bans on Salary History Inquiries Requires Employer Diligence

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Brittany N. Clark  
803.540.2171  
BClark@nexsenpruet.com

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A seemingly innocuous interview question is now illegal to ask job applicants in numerous jurisdictions, and the number of jurisdictions implementing similar bans is increasing rapidly.

More state and local governments are passing legislation and regulations that prohibit employers from asking for salary history information from job applicants and prospective employees. The recent and dramatic rise in these laws in jurisdictions across the nation requires employer diligence. Employers should be cognizant of the increased regulation of this space and should carefully review the relevant laws in all jurisdictions in which they do business. A more fulsome analysis of this issue and the various laws and implications follows.

## What's Behind the Bans?

Underlying the salary history bans is an attempt by a number of state governments and local legislatures to remedy pay inequity. In enacting these laws, advocates and lawmakers have expressed that asking about salary history could contribute to pay gaps by cementing past pay discrimination and trapping women in a cycle of earning lower salaries than male colleagues doing the same jobs. In essence, the fear is that an employer privy to a prospective woman employee's disparate salary history at the hiring stage will perpetuate that wage disparity further when the employer determines pay for the applicant and inevitably (even if unintentionally or unknowingly) arrives at a lower salary for the current job. Accordingly, salary history bans are intended to level the pay gap playing field by removing employer consideration of potentially discriminatory pay history when employers decide appropriate compensation for jobs.

## How Do Employers Comply and What Exactly is Banned?

Currently, no uniform federal law prohibits employers from inquiring about salary history; therefore, salary history related bans, prohibitions, exemptions, and restrictions vary widely among state and local jurisdictions. As a result, the sometimes convoluted patchwork of state, city, county, and other municipal and local laws – each with its own specific prohibited conduct, exceptions, and remedies – present an increasing challenge to employers seeking to comply with the applicable laws in the hiring and interviewing processes.

While there is no uniform law and each jurisdiction is different – and companies must carefully review the law in their applicable jurisdictions – the general provisions of these salary history bans include the following notions:

- Affects staffing employees as well as direct hire practices; applies to employers and/or job candidates in the affected jurisdictions (remote workers included).
- Makes it an unlawful employment practice for employers, employment agencies, or an agent thereof to inquire about the “salary history” of a job applicant. This generally prohibits employers from requiring applicant disclosure; asking a question in an interview about salary history; asking an applicant’s former or current employer for the information; searching public records for the information; and conditioning an interview or employment on disclosure of the information. In most jurisdictions, salary history is broadly interpreted to include wages (salaried or hourly), benefits, and other compensation.
- Not necessarily applicable to internal transfers or promotions, though caution should be exercised if the internal transfer is construed as an entirely new position.
- Employer can inquire as to “objective measures” of applicant’s productivity.
- No retaliation against applicants for non-disclosure.

The avenues to enforcement and available remedies or penalties for violations also differ widely from jurisdiction to jurisdiction. The majority of the laws across jurisdictions provide for large fines and civil lawsuits in the event of a violation, but each remedy is different depending on the jurisdiction. Some jurisdictions include a private right of action and allow courts much discretion in determining what it deems an appropriate remedy, including “compensatory damages, attorney’s fees and costs, punitive damages and such legal and equitable relief as the court deems just and proper.” (See, e.g., Connecticut).

## Employers Beware of Variations among Jurisdictions

Employers would be well served to be proactive in reviewing applicable regulations for each relevant jurisdiction, and to also recognize that the laws differ substantially across jurisdictions, even when it comes to the details. Understanding the details is critical for compliance.

For example, some of the laws preclude employers from relying on individual pay history to set compensation even if the information is volunteered or discovered inadvertently. The timing of the prohibition on inquiries also differs across jurisdictions—some bans apply to all aspects of the hiring process and some apply up until the point a job offer is extended. Moreover, some bans prohibit employers from disciplining employees for discussing wages with their coworkers.

## Employers—Next Steps and Best Practices

In short, the already highly regulated field of employment law is becoming even more regulated. It is incumbent upon employers to track the changes in the law in all jurisdictions in which they operate to ensure compliance. The following are some key takeaways to proactively work toward compliance:

- Train and educate recruiters, HR personnel, management, or anyone involved in the hiring and interview processes so they are aware of and understand any applicable laws and regulations surrounding salary history and pay equity.
- Review current versions of job applications, job postings, and related hiring or recruiting materials to ensure they comply with applicable laws, and revise accordingly.
- Implement periodic reviews of legislation and pending legislation relating to salary history bans in jurisdictions where employers do business.
- Regularly review, tailor, and update company policies and practices related to hiring in accordance with applicable laws and regulations.
- Exclude salary history requests or related inquiries from applicants in the affected jurisdictions.
  - In job interviews, consider focusing inquiries on an applicant's salary expectations rather than salary history. Be cautious, however, that questions around salary "expectations" could not be construed as veiled attempts to determine actual salary history.
- Review and modify existing policies to prohibit disclosure of salary history information to any potential employer or recruiter as part of a reference check.

As noted above, employment law is growing in its complexity. We will follow the developments on this salary history ban issue and provide updates accordingly. If you need more information on salary history inquiries or any other matter, please contact Nexsen Pruet's Employment & Labor Law team.

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