THOMSON REUTERS
Westlaw®

What not to ask: The changing laws on questions about prior salary

By Anne R. Yuengert, Esq., and Amy E. Puckett, Esq., *Bradley Arant Boult Cummings LLP*

MAY 22, 2018

What was your previous salary? What did your prior job pay you? What is your current paycheck? These formerly routine and seemingly mundane questions can now put employers on the wrong side of the law in many places.

California, Delaware, Massachusetts, New Jersey, Oregon and Puerto Rico, as well as cities such as New York and New Orleans, all have laws barring employers from asking job applicants about current or former salaries.

The goal of this legislative trend is to reduce the wage gap between men and women in the workforce. Applicants who answer questions about current or prior salary, regardless of whether they are being paid appropriately at the time, may be setting a precedent as to how they will be paid going forward.

> The goal of the legislative trend barring salary history questions is to reduce the wage gap between men and women in the workforce.

Also, it appears that men and women are treated differently when it comes to this question — whether they answer it or not.

A PayScale survey looked at the effect of disclosing prior salary.[1] Data gathered from more than 15,000 respondents indicated that female applicants who did not reveal their salary history were paid 1.8 percent less than female applicants who did, while male applicants who did not answer the prior salary question were paid 1.2 percent more than male applicants who did.

This double standard is exactly what new legislation aims to prevent.

THE LEGISLATIVE TREND

New legislation has been cropping up in the following states and cities:

- California (effective Jan. 1): Employers cannot ask for an applicant's pay history (in writing or verbally).
- Delaware (effective Dec. 14, 2017): Employers cannot ask for pay history until after a job offer has been made and accepted by the applicant.
- Massachusetts (effective July 1): Employers cannot screen applicants based on pay history or from asking for pay history. Employers also cannot get the information from the applicant's current or former employer until after an offer has been officially accepted.
- New Orleans (effective June 2017): City agencies cannot search for an applicant's pay history.
- New York City (effective Oct. 31, 2017): Employers cannot ask or search for an applicant's pay history.
- Oregon (effective Jan. 1, 2019): Employers cannot ask for an applicant's pay history.
- Philadelphia (scheduled to go into effect May 23, 2017): Employers cannot ask for an applicant's pay history or use pay history to set the wages for that individual unless the applicant willingly discloses their history.[2]
- Pittsburgh (effective March 2017): City agencies cannot ask for an applicant's pay history.
- Puerto Rico (effective March 2017): Employers cannot ask about an applicant's pay history unless the applicant volunteers the information or a job offer has already been offered and accepted.

EQUAL PAY ACT

Even if employers do not specifically ask about an applicant's pay history, they still need to be careful not to run afoul of the federal Equal Pay Act, 29 U.S.C.A. § 206(d).

The Equal Pay Act, which has been around since 1963, provides that no employer shall discriminate between employees based on sex "by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill,

effort, and responsibility, and which are performed under similar working conditions."

Unlike Title VII, the Equal Pay Act does not require a plaintiff to show that the employer intended to discriminate based on sex. Instead, a female Equal Pay Act plaintiff need only show that she is doing the same job as a male employee (and she only needs to have one male comparator) but is paid less.

If the plaintiff can establish those facts (and that is not always easy), the employer must prove one of four affirmative defenses, which include the defense that the pay differential was "based on any factor other than sex."

THE 9TH CIRCUIT

In a recent opinion, the 9th U.S. Circuit Court of Appeals framed the question as follows: Can an employer justify a wage differential between male and female employees by relying on prior salary?

The court answered this question with a resounding no, overturning a 1982 case that suggested otherwise. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). The facts of the *Rizo* case make clear that even a well-intentioned and consistently applied reliance on prior pay can get an employer in trouble.

"Prior salary alone or in combination with other factors cannot justify a wage differential," the appeals court said. "To hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum — would be contrary to the text and history of the Equal Pay Act."

In 2009 the Fresno County Office of Education hired Aileen Rizo as a math consultant. In setting her salary, Fresno County applied Standard Operating Procedure 1440, which set the salary of new hires by adding 5 percent to their prior salary and then using that amount to put them in the salary schedule. This is how Fresno County set everyone's salary — regardless of race, sex or anything else.

A few years later, Rizo learned from co-workers that male colleagues who started after her were making more money. Suffice it to say, she was not happy about that and filed a complaint.

Fresno County responded that it set everyone's salary in the same way, and it claimed its process placed more women than men in higher compensation steps. Still not happy, Rizo filed a lawsuit under several state and federal statutes, including the Equal Pay Act.

Fresno County conceded that it paid Rizo less than it paid her male counterparts. It nonetheless moved for summary judgment, arguing that an employee's prior salary is a "factor other than sex" under the EPA.

The District Court denied Fresno County's motion but certified the case for immediate appeal. *Rizo v. Yovino*, No. 14-cv-423, 2015 WL 9260587 (E.D. Cal. Dec. 18, 2015).

A three-judge 9th Circuit panel vacated the District Court's decision, indicating that Fresno County could rely on prior salary. *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017).

The panel held that the 9th Circuit's decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), had settled the issue decades earlier. In *Kouba*, prior salary was found to be a "factor other than sex." Rizo then asked for the entire 9th Circuit to weigh in.

In an en banc decision, the 9th Circuit did exactly that, indicating its intent to "clarify the law, including the vitality and effect of *Kouba*."

> "[P]rior salary alone or in combination with other factors cannot justify a wage differential," the appeals court said. "To hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum — would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the act stands."

WHAT DOES THIS MEAN FOR EMPLOYERS?

Employers in the 9th Circuit (which covers the entire West Coast, as well as Alaska, Arizona, Hawaii, Idaho, Montana and Nevada) should take any consideration of prior salary out of their hiring matrix.

Instead, employers should focus their interview and evaluation on an applicant's experience (years and otherwise), education and skills.

Once the selection process has been completed, they should offer a salary that is commensurate with the candidate's background and consistent with the applicable peer group in your organization.

Employers in other areas of the country should check their state laws and federal circuits to find out if they can ask about or rely on prior pay history. In light of all the recent legislation, many companies, including Amazon, Bank of America and Wells Fargo, have already instituted policies prohibiting questions about prior compensation.

If they have not already done so, employers should review their job application forms and ensure they contain no

questions about current or prior salary. They should also train employees who participate in the hiring process to avoid questions about prior or current salaries. In addition, they should be careful about gathering information about applicants' desired compensation.

Finally, employers (with the assistance of counsel) should regularly look at pay data to compare long-term employees versus more recent hires to see if they have a potential problem under the Equal Pay Act.

NOTES

[1] *Is Asking for Salary History ... History?,* PayScale, https://bit.y/2KnX3oH.

[2] U.S. District Judge Mitchell S. Goldberg of the Eastern District of Pennsylvania on April 30 issued an order granting in part and denying in part a motion brought by the Chamber of Commerce for Greater Philadelphia for a preliminary injunction seeking to block the ordinance. Under that order, Philadelphia cannot prohibit pay history inquiries but can prohibit employers from relying on wage histories when making wage determinations. *Chamber of Commerce for Greater Phila. v. City of Phila.*, No. 17-cv-1548, 2018 WL 2010592 (E.D. Pa. Apr. 30, 2018).

ABOUT THE AUTHORS

Anne R. Yuengert (L) is a partner in **Bradley Arant Boult Cummings LLP**'s labor and employment practice group in Birmingham, Alabama. She advises clients on managing employees, including conducting workplace investigations of harassment or theft, training employees and supervisors, assessing reasonable accommodations for disabilities, and working through issues surrounding FMLA and USERRA leave. She also handles EEOC charges as well as OFCCP and DOL complaints and investigations. **Amy E. Puckett** (R), CIPP, is an associate in the firm's Charlotte, North Carolina, office. Her practice focuses on employment law, data privacy, consumer protection and financial services regulatory compliance. She counsels clients on effective employment policies, data privacy, and compliance with various state and federal regulations, as well as data breach response and notification requests.