



Maryland Employers, Beware: Salary History Ban Now Extended To Job Applicants

Insights

9.17.20

Maryland employers will soon be prohibited from requesting or relying on an employment applicant's wage history to make decisions about employment or initial pay rates, requiring many employers to take immediate changes to their hiring practices. Beginning on October 1, 2020, Maryland will join numerous other states and local jurisdictions that have banned or restricted reliance on applicants' salary histories to set wage rates for open positions. While Maryland employers can rely on wage histories voluntarily provided by applicants with some important restrictions, you should tread carefully in doing so. What do you need to know about this important change to state law?

Brief History: How Did We Get Here?

In 2016, Maryland passed the Equal Pay for Equal Work law, which prohibits gender-based pay discrimination. However, the law applied only to employees and not to job applicants. This past legislative session, state lawmakers passed two amendments to the Equal Pay law which (1) extend certain protections to applicants for employment; and (2) prohibit retaliation against employees for asking about their own wages. The proponents of these amendments believe that minimizing reliance on an applicant's historical compensation will promote pay equity.

Key Provisions: What Do You Need To Know?

As noted above, there are two key changes to the law: a statewide salary history ban, and an anti-retaliation provision.

Salary History Ban And Salary Range Transparency

The first amendment, HB123, creates a salary history ban and also requires employers to provide a wage range for an open position to applicants upon request.

First, the new law imposes several restrictions on inquiring about or using salary history in the hiring process. The law prohibits you from requesting or seeking an applicant's wage history, either directly from the applicant or their agent, or indirectly (such as through a current or former employer). You are also prohibited from relying on the wage history of an applicant in screening or considering the applicant for employment or in determining wages for the applicant.

Once you make an initial offer of employment that includes a proposed amount of compensation for the position, however, you may rely on any wage history **voluntarily provided** by the applicant to

the position, however, you may rely on any wage history **voluntarily provided** by the applicant to increase the initial wage you have offered or to seek to confirm the wage history to support a higher offer. In either case, you can rely on the salary history provided by the applicant only if the higher wage offered does not result in an unlawful pay differential based on sex or gender identity.

You may not retaliate against or refuse to interview, hire, or employ an applicant because the applicant did not provide wage history or requested a wage range.

Second, Maryland employers must provide an applicant with the wage range for an open position upon request. It's important to note that the law does not impose an affirmative requirement to provide applicants with wage ranges for open positions. Instead, you must do so only when asked for wage range information.

Finally, the amendment prohibits you from retaliating against an applicant for employment because the applicant makes a complaint, brings an action against you, or testifies against you under the Equal Pay law. Conversely, applicants are prohibited from making groundless or malicious complaints against employers or otherwise proceeding in bad faith.

Anti-Retaliation Provision

The second amendment, HB14, prohibits you from retaliating against a current employee for inquiring about their own wages. The law previously only prohibited employers from taking any adverse employment action against an employee for inquiring about another employee's wages. It did not extend protections to employees who might question their own salaries, which might be done, for example, in the context of comparing their wages with the salaries of others. The law will now be applied to cover such situations as well.

Remedies: What Can Be Recovered?

Applicants can submit complaints to the Maryland Department of Labor's Commissioner of the Division of Labor and Industry. If an employer is found to have committed violations of the new provisions outlined in HB123, the Commissioner must issue an order directing compliance by the employer. The Commissioner may also:

- for a first violation, issue a letter to the employer compelling compliance;
- for a second violation, assess a civil penalty of up to \$300 per applicant; or
- for each subsequent violation that occurs within 3 years after a previous determination of violation, assess a civil penalty of up to \$600 per applicant.

In determining the amount of the penalty, the Commissioner must consider several factors, including the gravity of the violation, employer size, the employer's good faith, and the employer's history of violations. While these remedies are not necessarily onerous, it's important to keep in mind that other violations of the Equal Pay for Equal Work law are subject to actions for damages and/or injunctive relief, including private actions by affected employees or actions brought by the Commissioner.

Takeaways: What Should You Do?

Employers should consider taking the following steps to ensure compliance with the new law:

1. Modify company policies and practices as needed.
2. Train Human Resources personnel, managers, and supervisors regarding the new salary history requirements and restrictions.
3. Be sure to establish formal wage ranges for all positions, and be prepared to provide the wage range for any open position to applicants upon request.
4. Partner with counsel in conducting a proactive pay equity audit of your workforce to ensure legal compliance with Maryland's Equal Pay for Equal Work law and other applicable laws (working with counsel will ensure that the work is conducted under attorney-client privilege and is not discoverable in litigation).

We will continue to monitor developments related to this new law and its effect on Maryland employers. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. If you have questions about how to ensure that your pay practices comply with Maryland's Equal Pay for Equal Work law or other applicable laws, contact any attorney in [our Bethesda office](#) or any attorney in our [Pay Equity Practice Group](#).

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation

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