



Banning The Bans: Michigan and Wisconsin Buck the Salary History Ban Trend

Insights

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The backlash has begun: whereas an increasing number of employers are now banned from asking prospective employees about their salary history, local jurisdictions in two states face a ban from instituting such bans. What do employers need to know about this latest development in the pay equity world?

Trend: Bans Spreading Across Nation

To date, at least 11 states and localities have instituted salary history bans, generally prohibiting employers from asking about employees' salary histories on applications or during the hiring process (including [California](#), [Massachusetts](#), [Oregon](#), [New York City](#), [San Francisco](#), and [Albany, NY](#)). And other states and local jurisdictions are no doubt poised to follow suit, so expect this number to swell in the coming months and years.

The rationale behind salary history bans is fairly obvious. Because women generally earn 80 cents on the dollar as compared to men, an employer privy to a woman's disparate wage history is more likely (and, in most instances, of course, unintentionally) to perpetuate this wage disparity by factoring the prospective employee's wage history into the decision as to how much to offer in the new job. After all, businesses generally strive to minimize expenses, and wages are an expense, driven largely by market factors.

Prospective employees who historically earned less than other prospective employees are more likely to accept a lower wage than those who historically earned more, and employers armed with such information are more likely to offer a lower wage. Therefore, the salary bans are designed to level the playing field when it comes to wages by removing potentially discriminatory pay history as a possible factor in deciding appropriate compensation

Backlash: Ban The Bans

Two states, however, are bucking the trend. In essence, these states are banning salary bans. On March 26, 2018, Michigan's Republican Governor Rick Snyder signed legislation, which went into effect immediately, that provides:

A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or

resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee. This section does not prohibit an ordinance, local policy, or local resolution requiring a criminal background check for an employee or potential employee in connection with the receipt of a license or permit from a local governmental body.

Similarly, on March 29, 2018, Wisconsin lawmakers passed legislation specifically prohibiting salary bans—legislation that is in the queue for Republican Governor Scott Walker’s (most likely inevitable) signature. Section 5 of AB 748 provides:

(1) An employer may solicit information regarding the salary history of prospective employees.

(2) The legislature finds that the provision of an employer right to solicit salary history information that is uniform throughout the state is a matter of statewide concern and that the enactment of an ordinance by a city, village, town, or county that prohibits an employer from soliciting salary information would be logically inconsistent with, would defeat the purpose of, and would go against the spirit of this section. Therefore, this section shall be construed as an enactment of statewide concern for the purpose of providing an employer right to solicit salary information that is uniform.

(3)(a) No city, village, town, or county may enact or enforce an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective employees.

(3)(b) If a city, village, town, or county has in effect on the effective date of this paragraph . . . an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective employees, the ordinance does not apply and may not be enforced.

Similar efforts to effectively ban salary history bans also have been made, but failed, in Minnesota, Washington, and Mississippi.

Proponents of the salary ban bans cite the need for uniformity and the difficulty employers in multiple jurisdictions face in trying to navigate the patchwork of laws that might spring up. They also cite resistance to government interference in the hiring process.

In any event, the trend nationally still appears to be an increase in laws banning asking about salary history. Employers—especially those with multistate operations—should consider whether it makes sense to employ a patchwork system of asking for salary history where it is permitted (and refraining from asking where it is not), or simply eliminating the inquiry altogether for ease of compliance and administration.

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