



WORKPLACE JUSTICE

ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB

Despite state and federal laws designed to combat pay discrimination, a persistent gender wage gap remains in America. Even at the beginning of their careers, women earn less than their male colleagues performing the same job with the same education and experience, and that wage gap grows over the course of women's careers.

"What is your current or prior salary?" is a question that many job applicants dread, with good reason. Employers' use of this information in the hiring process has a disproportionately negative impact on women and people of color, who face conscious and unconscious discrimination in the workplace and, consequently, are paid lower wages, on average, than white, non-Hispanic men.

Employers' requests for an applicant's salary history in the hiring process, and reliance on that information to determine compensation, forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job. As a result, several federal courts and an increasing number of cities and states are prohibiting employers from basing compensation on an employee's salary history.

How employers use salary history

- Some employers use salary history to determine a new hire's starting pay, providing a standard percentage increase over the new hire's previous salary or otherwise directly correlating the new hire's pay to her salary history.¹
- Some employers use salary history to screen out job applicants whose salaries, the employer determines, are too high or too low to allow them to be considered for the job. The employer assumes that someone whose salary is "too

high" would not be interested in a lower-paying job and that someone whose salary is "too low" does not have sufficient skill, knowledge, or experience for the position.²

- Some employers ask for salary history as part of the salary negotiation. Even if the employer is willing to pay an applicant significantly more than she previously made, the negotiation is likely to be affected by "anchoring," a cognitive tendency to heavily weight the first piece of information encountered during a decision-making process.³ Because of this cognitive bias, a low prior salary may have an outsized effect on the salary negotiation and the employer's perception of a reasonable salary for the employee, depressing the resulting salary offer.
- Some employers use salary history to evaluate and compare applicants' job responsibilities and achievements. As with screening, this practice assumes that prior salaries are an accurate measure of an applicant's experience and achievements, and not the product of discrimination, bias, or other factors that are simply irrelevant to the employer's business.⁴

Reliance on salary history in the hiring process harms women

Women job applicants, especially women of color, are likely to have lower prior salaries than their male counterparts. Indeed, women working full time, year-round typically are paid only 80 cents for every dollar paid to their male counterparts—and compared to white, non-Hispanic men, women of color face even larger wage gaps.⁵ Even when factors like race, region, unionization status, education, occupation, industry, and work experience are taken into account, 38 percent of the wage gap remains unexplained.⁶ Because women systematically are paid less than men, employers who rely on salary history to select job applicants and to set new hires' pay will tend to perpetuate gender- and race-based disparities in their workforce.

There are several reasons why women, on average, will be responding to the "What is your salary history" question with



lower prior salaries than men. And they have nothing to do with women's skill, knowledge, experience, negotiation abilities, or fit for the job.

- **First**, it is well-documented that women, and especially women of color, face overt discrimination and unconscious biases in the workplace, including in pay. For example, in a recent experiment where scientists were presented with identical resumes—one with the name John and the other with the name Jennifer—the scientists offered the male applicant for a lab manager position a salary of nearly \$4,000 more.⁷ By using a person's salary history to evaluate her suitability for a position or to set her salary, new employers allow past discrimination to drive hiring and pay decisions. In other words, this practice forces women to carry pay discrimination with them from job to job.
- **Second**, women are more likely to have worked in lower-paid, female-dominated professions that pay low wages simply because women are the majority of workers in the occupation.⁸ Relying on applicants' salary histories to set starting salaries perpetuates the systemic undervaluing of women's work, even where women enter male-dominated or mixed-gender industries.
- **Third**, women still shoulder the majority of caregiving responsibilities and are more likely than men to reduce their hours or leave the workforce to care for children and other family members.⁹ Asking about salary history harms women seeking to reenter the workforce, since their last salary may no longer reflect current market conditions or their current qualifications.

Some employers claim they need to know the salary history of applicants in order to determine the market value of an applicant or the position. But salary is not a neutral, objective factor. Indeed, it often reflects the historical market forces which value the equal work of one sex over the other. Salary history is also an imperfect proxy for an applicant's value or interest in a position. For example, relying on salary history can lead to depressed wages for individuals who have previously worked in the public sector or in non-profits and are moving into the private sector; it can deprive senior individuals with higher salaries who are looking to change jobs or re-enter the workforce the opportunity to be considered for lower paying jobs they might seek.

The class action law suit *Beck v. Boeing*,¹⁰ settled in 2004 for \$72.5 million, illustrates how reliance on past salary leads to employers paying women less. Boeing set the salaries of newly hired employees as their immediate past pay plus a hiring bonus which was set as a percentage of their past

salary. Raises were also set as a percentage of an employee's salary. Boeing claimed it set pay based on a neutral policy, but since women had lower average prior salaries than men, these pay practices led to significant gender disparities in earnings that compounded over time and could not be justified by performance differences or other objective criteria.

The EEOC and several federal courts have held salary history cannot justify paying women less

Since 2000, the Equal Employment Opportunity Commission has instructed that reliance on salary history does not, by itself, legally justify paying women less. The EEOC explains that "permitting prior salary alone as a justification for a compensation disparity 'would swallow up the rule and inequality in compensation among genders would be perpetuated.'"¹¹

Many courts, including several federal Courts of Appeals, have agreed, rejecting employers' arguments that basing pay on salary history alone is a neutral "factor other than sex" justifying paying women less and lawful under the Equal Pay Act.¹² These courts point to the fact that salary histories reflect historical discriminatory market forces.

However, some courts have broken with the EEOC's position on salary history, and have permitted employers to rely on employees' salary history to justify paying women less for the same work.¹³ Recently, a panel of judges on the Ninth Circuit Court of Appeals held that an employer can justify paying a woman less for the same work based on her salary history alone, so long as the employer shows that its reliance on salary history serves a business purpose and is used reasonably.¹⁴

This mix of court decisions makes it all the more important to enact legislation clearly banning the harmful use of salary history in the hiring process.

Many states and localities have enacted or are considering salary history bans

In August 2016, Massachusetts became the first state to prohibit employers from asking job applicants for salary history.¹⁵ Since then, cities and states across the country have rapidly followed suit. Philadelphia, Pittsburgh, New York City, and New Orleans enacted ordinances or issued Executive Orders banning reliance on salary history in the hiring process.¹⁶ Oregon and Puerto Rico also enacted such laws, the New York Governor issued an Executive Order banning the salary history question by public employers, and salary history bans are currently awaiting Gubernatorial



signatures in Delaware and Illinois.¹⁷ In 2017 alone, nearly half of the states have considered legislation banning reliance on salary history in the hiring process. And in Congress, the Paycheck Fairness Act and the Pay Equity for All Act include prohibitions on employer screening job applicants based on their salary history or requesting applicants' salary history.¹⁸

Ending employers' reliance on salary history is an important step in closing the wage gap. And since the wage gap has barely budged in more than a decade, we need to act now to stop this practice.

- 1 See Lynda Spiegel, *How Job Seekers Should Handle Salary History Requests*, WALL ST. J. (Apr. 20, 2017), <https://blogs.wsj.com/experts/2017/04/20/how-job-seekers-should-handle-salary-history-requests/> ("hiring managers tend to benchmark their offer at 10% to 15% above a candidate's most recent salary").
- 2 See June Bell, *He Earned, She Earned: California Bill Would Limit Use of Salary Information*, SHRM.ORG. (Aug. 29, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-salary-history.aspx> ("salary history 'is one component businesses look at to see if candidates are equally qualified.'"); Jena McGregor, *The Worst Question You Could Ask Women in a Job Interview*, WASHINGTON POST (April 14, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/04/14/the-worst-question-you-could-ask-women-in-a-job-interview/> ("Higher salaries also have what's known as a "branding" impact. Just as consumers think pricier products are better quality, recruiters and managers can have the same reaction when a job candidate has a higher past salary, Anderson explained. "It may trigger a conviction that one hire is lower quality than another, even if that isn't the reality.").
- 3 See Bourree Lam, *The Government Thinks that Interview Questions about Salary History are Holding Women Back*, THE ATLANTIC (Aug. 10, 2015), <http://www.theatlantic.com/business/archive/2015/08/hiring-interview-gender-gap-pay-salary-history-opm/400835/>; TODD J. THORSTEINSON, INITIATING SALARY DISCUSSIONS WITH AN EXTREME REQUEST: ANCHORING EFFECTS ON INITIAL SALARY OFFERS, JOURNAL OF APPLIED SOCIAL PSYCHOLOGY (2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1559-1816.2011.00779.x/abstract>.
- 4 See June Bell, *He Earned, She Earned*, *supra* note 2; Jena McGregor, *The Worst Question You Could Ask Women in a Job Interview*, *supra* note 2.
- 5 NAT'L WOMEN'S LAW CTR, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Sept. 2016), available at <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.
- 6 Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Jan. 2016), available at <http://www.nber.org/papers/w21913.pdf>.
- 7 Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, Proceedings of the National Academy of Science of the United States of America (Aug. 2012), available at <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.
- 8 Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (April 3, 2010), available at http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.
- 9 NAT'L WOMEN'S LAW CTR, MOVING WOMEN AND FAMILIES FORWARD: A STATE ROADMAP TO ECONOMIC JUSTICE 37 (MAR. 2016), <https://nwlc.org/resources/moving-women-families-forward-state-roadmap-economic-justice/>.
- 10 *Beck v. Boeing* (W.D. Wash. 2000).
- 11 EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL, No. 915.003 § 10-IV.F.2.g (Dec. 2000), available at <https://www.eeoc.gov/policy/docs/compensation.html>
- 12 See, e.g., *Cole v. N. Am. Breweries*, No. 1:13-cl-236, 2015 WL 248026, at *10 (S.D. Ohio Jan. 20, 2015) (citing *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (finding that that a beer distributor improperly used a female hire's previous salary to set her pay significantly lower than that of her male predecessor, her male successor, and other male employees performing the same job); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity); *Faust v. Hilton Hotels Corp.*, 1990 WL 120615, at *5 (E.D. La. 1990) (reliance on prior salary as a factor other than sex would "allow employer to pay one employee more than an employee of the opposite sex because that employer or a previous employer discriminated against the lower paid employee"). *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. 2003) (citing *Irby* to find that the EPA "precludes an employer from relying solely upon a prior salary to justify pay disparity").
- 13 See, e.g., *Lauderdale v. Ill. Dep't of Human Servs.*, ---F.Supp.3d---, Civ. No. 13-3062, 2016 WL 5660369 (C.D. Ill. Sept. 28, 2016), appeal filed Nov. 2, 2016; *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776(SHS), 2008 WL 744733 (S.D.N.Y. Mar. 4, 2008)..
- 14 *Rizo v. Yovino*, No. 16-15372, 20017 WL 1505068 (9th Cir. Apr. 27, 2017), *petition for rehearing and rehearing en banc filed* May 10, 2017.
- 15 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151).
- 16 NY City Exec. Order No. 21 (Nov. 4, 2016), http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_21.pdf; Philadelphia Ordinance No. 160840 (Jan. 23, 2017), available at <https://phila.legistar.com/LegislationDetail.aspx?id=2849975&guid=239C1df9-8fdf-4D32-bacc-296B6ebf726C>; New Orleans Exec. Order No. MJL 17-01 (Jan. 25, 2017), available at <http://www.nola.gov/mayor/press-releases/2017/20170125-pr-mayor-issues-executive-order-to-address/>; Pittsburgh Ordinance No. 2017-1121 (Jan. 30, 2017), available at <https://pittsburgh.legistar.com/LegislationDetail.aspx?id=2931161&guid=E45D1721-68E5-4bec-9989-59C275B74aa7&Options=id%7ctext%7C&Search=Salary+history&FullText=1>; New York City Ordinance No. 1253-2016 (May 4, 2017), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?id=2813507&guid=938399E5-6608-42F5-9C83-9D2665D9496F&Options=&Search=>.
- 17 NY Exec. Order No. 161 (Jan. 9, 2017), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/eo_161.pdf. Act 16, 18th Leg., 1st Sess. (P.R. 2017); H.B. 2005, 79th Leg. Assemb., Reg. Sess. (Or. 2017) (amending OR. REV. STAT. §§652.210, 659A.030); H.S. 1 to H.B. 1, 149th Gen. Assemb. (Del. 2017) (amending 19 Del. C. § 709 (2016)); H.B. 2462, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (amending 820 ILL. COMP. STAT. ANN. 112 §10, §30).
- 18 Paycheck Fairness Act, S. 819, 115th Congress; Pay Equity for All Act, H.R. 2418, 115th Congress.

