

How To Handle Salary History When Hiring In California

[Christopher A. Lilly](#)

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By now you have probably heard that as of January 1, 2018, all California employers will be prohibited from asking prospective employees about their salary history. Specifically, section 432.3 will be added to the Labor Code providing that: (1) an employer may not personally or through an agent seek salary information, including compensation and benefits, about an applicant; (2) an employer may not use salary information in making a decision on whether to hire the applicant (the only exception to this rule is for the use of salary information obtained under certain public employee disclosure laws); (3) upon reasonable request, an employer must provide the applicant with a pay scale for the position (the law is unclear on what an employer must provide in response to this request); and (4) applicants may voluntarily and without prompting disclose salary history, and in that situation, the employer may use the information in determining the salary for that employee (but may not use this information in deciding whether to hire the applicant).

The Legislature has not provided a specific penalty for violation, however, further guidance may be coming by amendment or regulation. In the meantime, plaintiffs may attempt to enforce this new law under the Private Attorney General Act (PAGA) by seeking monetary penalties and attorneys' fees and costs.

Here are the action items to ensure compliance:

- Ensure that all questions asking for salary history are removed from job application forms, the company website, and any other forum under the employer's control;
- Review third-party websites where job openings may be posted to remove any offending questions about salary history;
- Modify contracts with the company's third-party recruiters so that they represent that they have carefully reviewed and will comply with this new law; and
- Train employees who conduct interviews on these new rules, including responding to a request for a pay scale (in many cases, it will not be readily available and the "reasonable request" language of the law should allow employers to provide the information after the interview), and responding to a voluntary disclosure of pay history (a contemporaneous memo should be placed in the Human Resources file stating that the applicant made the disclosure voluntarily and without prompting).

But this list of action items is unsatisfying to the typical employee charged with conducting interviews. Talking about an applicant's compensation is often a vital part of an interview to determine if the applicant is a good match for the job.

There are two potential tools available to interviewers to fill this need. First, nothing in the California law, or any of the other half a dozen similar laws passed in jurisdictions across the country, prohibits a discussion of the applicant's history of productivity. For example, an employer may ask about sales volume, the number of customers serviced, or hours worked. The interviewer, however, may not ask about any compensation tied to that productivity, including bonuses and commissions.

Second, there is some precedent allowing employers to ask about salary "expectations." This summer, the City of San Francisco passed a similar but more detailed law (ordinance no. 142-17) that becomes

effective within the geographic territory of the City on July 1, 2018. This ordinance expressly provides that the employer may ask about the applicant's salary "expectations." Employers may also under this ordinance discuss any unvested equity, deferred compensation, or any bonus that the applicant would forfeit by virtue of resigning from their current employer. These safe harbor provisions are identical to a recently passed law in New York City. It must be emphasized that these safe harbor provisions are not in the new California law and a company should not institute policy based on this city-level precedent. However, clarity on this important issue should hopefully come within months.

The rationale behind this new law is that there exists in this State a discriminatory pay gap between the genders, and that asking prospective employees about pay history perpetuates that unfair pay gap. Advocates for the law have a mantra: "pay the position, not the person." Keeping this in mind while implementing policy changes to comply with this new law will help reduce costly litigation.