

One Minute Memo®



California's Salary History Ban Goes Into Effect But With A Twist

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Seyfarth Synopsis: Effective on January 1, 2018, California's new salary history ban law will prohibit inquiries about an applicant's salary history and will create an affirmative obligation to disclose a "pay scale" upon an applicant's "reasonable request."

In less than a week, on January 1, 2018, California's new law prohibiting employers from relying on prior salary as a factor in setting compensation goes into effect. The law extends to public and private employers, as well as their agents, who will no longer be able to seek information about an applicant's "compensation and benefits."

For most employers, the new requirements are necessitating changes to existing recruiting practices, ranging from revising application forms to reviewing interview guidelines. Most importantly, however, many employers are grappling with how best to make starting salary decisions, now that a key factor that was often used as an additional indicia of experience, will no longer be available. To fill this gap, some employers are relying more heavily on market survey data. Others are taking a fresh look at their overall salary structure and implementing salary grades and ranges where none currently exist or are considering changes such as building in experience levels or other pay differentiators for purposes of making starting salary decisions.

While California's new Labor Code Section 432.3 will prohibit employers from asking about or relying on prior salary information in deciding whether to offer a job and in deciding how much to pay, the new law does permit employers to consider salary history information in setting the applicant's starting salary when an applicant, "voluntarily and without prompting," discloses the information. However, employers who choose to base starting salary decisions on voluntarily disclosed information should keep in mind that the California Fair Pay Act (Lab. Code § 1197.5(a)(2)) will preclude employers from relying on prior salary, by itself, to justify any gender, ethnicity or race-based disparities in pay.

Not to be outshone by other jurisdictions that already have similar laws on the books, California's Section 432.3 adds a new twist to the salary history ban landscape: an obligation to provide the "pay scale" upon reasonable request by the applicant. This seemingly simple provision — "An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment" — has already generated far more questions than answers. In particular, employers are scratching their heads as they consider (1) What is a pay scale? and (2) What makes a request reasonable?

Surprisingly, the California legislature left both "pay scale" and "reasonable request" as undefined terms. Accordingly, unless and until there is further guidance, employers are free to determine how best to comply with this new disclosure

requirement. At a minimum, however, employers should ensure that those involved in the hiring process are made aware of the new requirement and are provided with guidance about how to respond to such inquiries.

From a practical standpoint, it may be helpful to consider that while a response is now mandated, hiring managers and recruiters have been routinely fielding the question “how much does the position pay” for years. Understanding the company’s practice in responding to this age-old question may be a good starting point for purposes of establishing a coordinated approach and practice in light of the new requirement, in the absence of further guidance from the legislature, courts or agencies.

Seyfarth’s Pay Equity Group will continue to evaluate how compliance with this new California law evolves and will alert you with further developments.

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Seyfarth Shaw LLP One Minute Memo® | December 28, 2017

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