

PUBLICATION

Delaware and Oregon Join the Movement Banning Employers from Making Salary History Inquiries

Authors: Donna M. Glover

June 23, 2017

Delaware and Oregon have joined Massachusetts and other local jurisdictions (like New York City, Philadelphia and Pittsburgh (currently in litigation)) by enacting laws that prohibit employers from inquiring about the salary histories of job applicants. Most of the provisions of Oregon's Equal Pay Act of 2017 take effect on January 1, 2019, which gives employers time to focus on compliance. Delaware's ban, however, takes effect on December 1, 2017, so those employers operating in Delaware need to act quickly to change their recruiting and related processes.

Delaware's Salary History Ban

Under Delaware's ban, an employer and an employer's agent may not require, ask or screen an applicant for employment about "compensation," which includes salary, benefits and other forms of compensation, such as bonuses, commissions, etc. Employers also may not seek compensation information from an applicant's prior employers.

The ban does not prohibit an employer, or an employer's agent, and an applicant from discussing and negotiating compensation expectations provided that the employer or employer's agent does not request or require the applicant's compensation history.

Delaware's Department of Labor will enforce the ban. Any employer or employer's agent who violates or fails to comply with the ban will be subject to a civil penalty of not less than \$1,000 and not more than \$5,000 for the first offense and not less than \$5,000 and not more than \$10,000 for each subsequent violation.

Oregon's Equal Pay Act

Oregon's Equal Pay Act (Act) prohibits salary history inquiries, magnifies existing remedies available to employees and provides a "safe harbor" if an employer voluntarily audits their compensation practices to identify and remedy any discriminatory pay practices.

Under the Act, employers must not "in any manner discriminate between employees on the basis of a *protected class* in the payment of wages or other compensation for work of comparable character." As such, Oregon's Act expressly broadens equal pay protections by not limiting those protections to "sex." That is, all protected classes (e.g., race, religion, etc.), not just equal pay between the sexes, are covered by the Act.

Regarding the ban on salary history inquiries, employers cannot ask applicants about their current compensation, may not base a salary offer on an applicant's current or past compensation, and cannot cut an employee's compensation in an effort to comply with the Act.

If the Oregon Bureau of Labor and Industries determines that an employer has violated the Act, the employer may be liable for unpaid compensation. Employees may file a complaint with Oregon's Bureau of Labor and Industries or bring a lawsuit against their employer. Employees are not required to file an administrative complaint before suing their employers. Compensatory and punitive damages are available if an employer is found to have acted with malice or willful misconduct. Employers may be able to avoid an award of

compensatory and/or punitive damages if it can show that it conducted a good faith equal pay analysis within the three years prior to the claims asserted, and eliminated – or make substantial progress to eliminate – any pay disparities.

Delaware's ban takes effect in less than six months. Employers should begin reviewing and revising paper and online application forms, policies and hiring practices to make sure that questions about salary history are eliminated and that policies and practices comply with these new laws. Hiring managers, recruiters and HR staff should be trained as to the law's requirements. Employers should also consider defensive measures such as documenting when an applicant voluntarily discloses salary history and/or other compensation data to avoid claims that the applicant was involuntarily required to disclose salary history information.