

2019

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## Recommended Citation

Nichols, Timothy J., "Closing the Wage Gap: Cities' and States' Prohibitions Against Prior Salary History Inquiries and the Implications Moving Forward" (2019). *Law School Student Scholarship*. 952.  
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# Closing the Wage Gap: Cities' and States' Prohibitions Against Prior Salary History Inquiries and the Implications Moving Forward

Timothy J. Nichols\*

## I. Introduction

In an effort to eliminate wage discrimination on account of sex, Congress enacted the Equal Pay Act of 1963 (EPA).<sup>1</sup> The EPA amended section 6 of the Fair Labor and Standards Act of 1938 (FLSA), adding a new subsection.<sup>2</sup> While this new subsection prohibits employers from paying workers of one sex different wages than workers of the other sex different wages for equal work, the subsection also includes four enumerated exceptions.<sup>3</sup> Despite efforts to eliminate wage discrimination based on gender, women earned eighty-three percent of what men earned in 2015 (granted, an increase from sixty-four percent in 1980).<sup>4</sup> While this pay gap is based on many factors, such as (1) women being more likely to take breaks from careers to care for a family, and (2) women being overrepresented in lower-paying occupations, surveys reveal this gap may also be a result of gender discrimination.<sup>5</sup>

The broadest and most controversial of the exceptions contained in the FLSA is a catch-all that permits disparities in pay between the genders “based on any other factor other than sex.”<sup>6</sup> Prior salary history, the focus of this Comment, is a regularly relied-upon factor employers assert as a “factor other than sex” when facing claims of gender-based wage discrimination under the

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<sup>1</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

<sup>2</sup> *Id.* The Act created 29 U.S.C. § 206(d) (1963) that prohibits gender discrimination in wage payment practices. *Id.* at 56–57.

<sup>3</sup> 29 U.S.C. § 206(d)(1) (1963).

<sup>4</sup> Anna Brown and Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/>.

<sup>5</sup> *Id.* Women were twice as likely as men to feel discriminated at work because of gender (18% vs. 10%); also, 77% of women and 63% of men believe more changes must be implemented to achieve gender equality in the workplace. *Id.*

<sup>6</sup> 29 U.S.C. § 206(d)(1) (1963).

EPA and FLSA, as seen in the cases discussed below.<sup>7</sup> Further adding to the controversy is the fact that the different circuit courts that have addressed the relationship between prior salary history and the “factor other than sex” exception have applied different standards in evaluating the claims.<sup>8</sup> Two circuit courts have held that prior salary history cannot be the *sole* factor in justifying pay disparities between the genders.<sup>9</sup> Two other circuit courts allow reliance on prior salary history as the sole justification, but conduct an inquiry into the reasonableness and asserted reasons for the reliance.<sup>10</sup> One final circuit court accepts prior salary history as a “factor other than sex” unequivocally.<sup>11</sup>

In an effort to continue closing the gender wage gap, multiple cities and states around the country have enacted legislation that prohibits employers from inquiring about applicants’ prior salary histories or requiring applicants to disclose such information.<sup>12</sup> All of these laws have a general prohibition on employers seeking an applicant’s prior salary history but have certain unique provisions and range from more restrictive to less restrictive depending on the particular law.<sup>13</sup> And although the push to institute these types of laws has intensified, these laws have been met with resistance.<sup>14</sup>

This Comment argues that state and town legislatures, displeased with the on-going wage discrepancy between the genders and the analysis and outcomes of the judiciary in cases alleging

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<sup>7</sup> See *supra* Part II(B)–(D).

<sup>8</sup> See *id.*

<sup>9</sup> See *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

<sup>10</sup> See *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *vacated, reh’g granted*, 869 F.3d 1004 (9th Cir.) (en banc); *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003).

<sup>11</sup> See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005).

<sup>12</sup> Dori Goldstein, *More Laws Enacted to Ban Salary History Inquiries*, BLOOMBERG BNA (Jun. 5, 2017), <https://www.bna.com/delaware-oregon-enact-b73014453430/>; F. Christopher Chrisbens, *San Francisco Joins the Salary History Inquiry “Ban” Wagon*, THE NAT’L L. REV. (Sept. 7, 2017), <https://www.natlawreview.com/article/san-francisco-joins-salary-history-inquiry-ban-wagon>.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part IV.

gender discrimination under the EPA, are enacting these new laws to remove the most controversial element of courts' analysis. Part II of this Comment provides an in-depth discussion of the EPA and the FLSA, along with the conflicting stances federal circuit courts have adopted regarding the interplay between prior salary history and one of the exceptions of the FLSA. Part III discusses the laws currently enacted by cities and states all across the United States as of this writing and compares and contrasts elements of the laws with each other. Part IV introduces some of the emerging backlash against the laws and the implications the laws have across the country now and moving forward. Part V argues that the cities and states enacting the laws are effectively circumventing one of the exceptions under the FLSA by removing prior salary in its entirety from the consideration, eliminating the catch-all from the courts' analysis. Part VI suggests that, until prior salary history inquiry bans become universally enacted, the Eighth and Ninth Circuits' approach is the correct approach to analyzing prior salary history as a "factor other than sex." Part VII briefly concludes.

## **II. The Equal Pay Act, "Factors Other Than Sex," and the Current Circuit Split**

### **A. The Equal Pay Act**

As mentioned above, the EPA "prohibit[s] discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."<sup>15</sup> The new subsection to FLSA added by the EPA states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such an establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>16</sup>

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<sup>15</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 56.

<sup>16</sup> *Id.* at 56-57; 29 U.S.C. § 206(d)(1) (1963).

The above text comes with a caveat, however, that a wage disparity ordinarily impermissible under the statute is otherwise permissible: “where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex.*”<sup>17</sup> The “factor other than sex” exception is the broadest-worded exception among the enumerated exceptions and the statute does not state a scope or any standard for determining which factors qualify as a “factor other than sex.”<sup>18</sup> Some have argued prior salary history should be considered a “suspect factor”—a factor that, if courts allow employers to rely on it to permanently justify salary disparities, could perpetuate gender-based violations of the EPA.<sup>19</sup>

Courts have also indicated caution when dealing with prior salary history as a “factor other than sex.”<sup>20</sup> The Ninth Circuit noted that prior salary history could be manipulated to provide a pretext for intentional gender discrimination, and an employer could take advantage of “unfairly low salaries historically paid to women” in order to perpetuate that discrimination.<sup>21</sup> The Seventh Circuit recognized the concern that previous employers might have engaged in sex-based discrimination in wage practices, thereby resulting in lower wages for female employees when current employers rely on that tainted prior salary history.<sup>22</sup> Despite this caution, courts accept that prior salary history may justify current pay disparities, but the courts are split on whether prior salary history satisfies the “factor other than sex” exception under the EPA.<sup>23</sup>

#### B. The Circuit Split: Prior Salary History and an Additional Factor

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<sup>17</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 57 (emphasis added).

<sup>18</sup> Jeanne M. Hamburg, Note: *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1087 (1989).

<sup>19</sup> *Id.* at 1102.

<sup>20</sup> See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Covington v. Southern Ill. Univ.*, 816 F.2d 317 (7th Cir. 1982).

<sup>21</sup> *Kouba*, 691 F.2d at 876.

<sup>22</sup> *Covington*, 816 F.2d at 323.

<sup>23</sup> See *infra* Part II(B)–(D); see also Hamburg, *supra* note 18, at 1085.

Some of the circuit courts adopted the viewpoint that prior salary history must be paired with an additional factor in order to qualify as a “factor other than sex” under the EPA. In *Irby v. Bittick*,<sup>24</sup> a female criminal investigator for a county sheriff’s department sued under the EPA when the department paid two new male additions to the team substantially more than she was paid.<sup>25</sup> The defendants argued that the reliance on the prior salaries of the male employees in setting their current salaries qualified as a legitimate factor other than sex.<sup>26</sup> The district court, however, rejected the argument, holding that “[p]rior salary alone is not a legitimate ‘factor other than sex.’”<sup>27</sup> The court explained that if prior salary history alone was the sole justification, the exception would swallow the rule, perpetuating gender pay inequality.<sup>28</sup> On appeal, the Eleventh Circuit recognized it consistently adhered to the view that under the EPA a pay disparity between the genders cannot be justified by prior salary history alone, and the court rejected reliance on prior salary history as a *sole* justification for the pay disparity.<sup>29</sup>

While the court rejected a reliance on prior salary history by itself, it nonetheless held that a defendant can rely on prior salary history as a “factor other than sex” when the defendant also relied on something else, such as experience.<sup>30</sup> The court found “there is no prohibition on utilizing prior pay as part of a mixed-motive.”<sup>31</sup> Since the defendants relied both on prior salary history and the experience of the two new male employees, the Eleventh Circuit was satisfied that the defendants properly relied on a “factor other than sex” under the EPA to justify a pay disparity.<sup>32</sup>

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<sup>24</sup> 44 F.3d 949 (11th Cir. 1995).

<sup>25</sup> *Id.* at 952–53.

<sup>26</sup> *Id.* at 955.

<sup>27</sup> *Irby v. Bittick*, 830 F. Supp. 632, 636 (M.D. Ga. 1993)

<sup>28</sup> *Id.*

<sup>29</sup> *Irby*, 44 F.3d at 955 (citing *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988)).

<sup>30</sup> *Irby*, 44 F.3d at 955.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 957.

In *Angove v. Williams-Sonoma, Inc.*,<sup>33</sup> a fired male employee sued for, among other things, gender discrimination based on Williams Sonoma paying him less than a female employee in the same position.<sup>34</sup> The plaintiff suggested that Williams Sonoma adhered to the “market factor” theory, whereby an employer justifies wage disparities based on the pay rates the two genders command in the marketplace.<sup>35</sup> After rejecting this contention for lacking relevance, the court noted that the focus of the plaintiff’s argument was that Williams Sonoma matched the female employee’s prior salary.<sup>36</sup> The Tenth Circuit then stated that considering a new employee’s prior salary history is not prohibited under section 206(d)(iv) of the EPA.<sup>37</sup> Instead, it is the employer’s *sole* reliance on prior salary to justify a pay disparity that is precluded by the EPA; and when an employer bases a new employee’s salary on prior salary history and something else like qualifications and experience, the employer has successfully invoked the “factor other than sex” defense.<sup>38</sup> The Tenth and Eleventh Circuits, by requiring an additional factor other than prior salary history for a “factor other than sex” defense, impose the strictest, most scrutinizing view of this exception under the EPA.

### C. The Circuit Split: Prior Salary History, Case-by-Case, and Reasonableness

Other circuit courts accept the use of prior salary history as the sole factor in a “factor other than sex” defense, unlike the above-mentioned cases,<sup>39</sup> but still conduct a factual analysis on a case-by-case basis or inquire into the reasonableness of the reliance on prior salary history. In *Taylor v. White*,<sup>40</sup> when a female United States Army employee sued her employer because her

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<sup>33</sup> 70 Fed. Appx. 500 (10th Cir. 2003).

<sup>34</sup> *Id.* at 504.

<sup>35</sup> *Id.* at 507.

<sup>36</sup> *Id.* at 508.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See supra* Part II(B).

<sup>40</sup> 321 F.3d 710 (8th Cir. 2003).

male colleagues performing the same work received higher pay,<sup>41</sup> she contended that an employer should be prohibited from relying on prior salary history or a salary retention policy to avoid liability under the EPA because relying on said factors allows the perpetuation of wage inequalities.<sup>42</sup> The Eight Circuit, however, stated that nothing on the face of the EPA indicates any limitations to the catch-all “factor other than sex” defense, and the legislative history bolsters the view of a broad interpretation of this catch-all exception.<sup>43</sup> While the court acknowledged that even a salary retention policy could be used to perpetuate unequal wages based on past discrimination, these concerns do not dictate adopting a per se rule finding all salary retention practices inherently discriminatory.<sup>44</sup>

Rather than adopt a per se rule, the court instead recognized “the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay.”<sup>45</sup> The Eighth Circuit thought a case-by-case analysis into the reliance on prior salary history or salary retention policies with a discerning eye on the alleged gender-based practices would protect certain freedoms in business as Congress intended with the “factor other than sex” defense.<sup>46</sup> What the Eighth Circuit did not endorse, however, is conducting a *reasonableness* inquiry into the employer’s actions or limiting the application of a salary retention policy to exigent circumstances only, as it would unnecessarily narrow the intent of the “factor other than sex” defense.<sup>47</sup>

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<sup>41</sup> *Id.* at 714.

<sup>42</sup> *Id.* at 717.

<sup>43</sup> *Id.* at 717–18. “[T]he catch-all provision is necessary due to the impossibility of predicting and listing each and every exception.” *Id.* at 718.

<sup>44</sup> *Id.* at 718.

<sup>45</sup> *Id.*

<sup>46</sup> *Taylor*, 321 F.3d at 720.

<sup>47</sup> *Id.*

The Ninth Circuit took a more narrow view than the Eighth Circuit, but still broader than the Tenth or Eleventh Circuits, in the most recent instance of a circuit court ruling on a gender discrimination case under the EPA, where a female county public schools employee sued the county after discovering the county paid her less than her male colleagues.<sup>48</sup> When the County moved for summary judgment, it acknowledged the pay disparity but based the discrepancy on a factor other than sex—prior salary history.<sup>49</sup> The district court rejected this defense and denied summary judgment, concluding that reliance exclusively on prior salary history is not a satisfactory “factor other than sex” defense.<sup>50</sup>

Relying on precedent, the Ninth Circuit held that there is no strict prohibition against using prior salary history under the EPA, but it does not automatically qualify as a “factor other than sex” for purposes of the affirmative defense.<sup>51</sup> Rather, prior salary history alone could satisfactorily justify a pay disparity only when “the factor ‘effectuate[s] some business policy’ and that the employer ‘use[s] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’”<sup>52</sup> When the plaintiff argued that relying on prior salary history alone would perpetuate existing pay disparities and therefore undermine the intended goal EPA, the court indicated that, in deciding the very same issue in *Kouba v. Allstate Insurance Co.*, requiring the employer to show that using prior salary history effectuated some business policy and the factor was used reasonably would alleviate these concerns.<sup>53</sup> While both the Ninth and the Eighth Circuits state that prior salary history alone satisfies the “factor other than sex” factor under the EPA, the Eighth Circuit’s case-by-case factual analysis and the Ninth Circuit’s “effectuated

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<sup>48</sup> *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *vacated, reh’g granted*, 869 F.3d 1004 (9th Cir.) (en banc).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1165.

<sup>52</sup> *Id.* (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982)).

<sup>53</sup> *Rizo*, 854 F.3d at 1166 (citing *Kouba*, 691 F.2d at 876–78).

business policy” nonetheless indicate these circuits will view reliance on prior salary history alone with some suspicion.

#### D. The Circuit Split: Deference to the Defense

One circuit court, in the broadest interpretation of the “factor other than sex” defense under the EPA, accepts prior salary history as a factor other than sex without any qualifications or limitations.<sup>54</sup> A female employee for the Department of Human Services in Illinois sued under the EPA, putting forward two arguments: (1) prior salary history must include an acceptable business reason; and (2) the use of prior salary history discriminates because all pay systems inherently discriminate based on sex.<sup>55</sup> The Seventh Circuit noted how four appellate courts accept prior salary history as a “factor other than sex,” but only if the employer had an acceptable business reason.<sup>56</sup> In looking to the actual statute, however, the court found that nothing in section 206(d) allows a court to set standards on what qualifies as an acceptable business practice, and that “the statute asks whether the employer has a reason other than sex—not whether it has a ‘good’ reason.”<sup>57</sup> As long as employers avoid forbidden reliance on criteria like race or sex, employers may set their own standards for determining pay.<sup>58</sup> The Seventh Circuit’s rule for prior salary history as a “factor other than sex” is reduced down to a single sentence: “[T]he employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion.”<sup>59</sup>

There is one caveat, however, to the Seventh Circuit’s rule. The court acknowledged that in certain lines of employment wage patterns could be discriminatory, but the court also noted how

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<sup>54</sup> See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005).

<sup>55</sup> *Id.* at 468.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 468–69.

<sup>59</sup> *Id.* at 469.

this must be proved and not assumed.<sup>60</sup> Where an employee has been discriminated against in a prior job in violation of the EPA, relying on those wages to determine a new salary would perpetuate said discrimination in violation of the EPA.<sup>61</sup> Absent evidence that plaintiff’s prior job engaged in wage discrimination in violation of the EPA, defendants’ reliance on that prior wage history was proper, and the court held the defendants were entitled to summary judgment.<sup>62</sup> The Seventh Circuit, unlike all of the cases mentioned above, grants the most deference to an employer’s use of prior salary history as a “factor other than sex.”

### **III. The Laws from Varying Cities and States**

Given the varying approaches taken by the Federal Circuits regarding prior salary history as a “factor other than sex” under the EPA in conjunction with the fact that all circuits accept prior salary history as a factor to some degree,<sup>63</sup> cities and states across the country have simplified the analysis: by removing prior salary history as a factor altogether.

#### **A. The Massachusetts Law**

The Massachusetts law is intended to close the wage gap between the genders, with a focus on the phenomenon that lower wages and salaries of women follow them throughout their careers.<sup>64</sup> The Governor signed the bill into law by on August 1, 2016, and it is expected to take effect July 2018.<sup>65</sup> It also bears mentioning that this new Massachusetts law includes a codification of section 206(d) of the FLSA as amended by the EPA, but noticeably absent in the enumerated exceptions is the broad “factor other than sex” language of the EPA.<sup>66</sup>

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<sup>60</sup> *Wernsing*, 427 F.3d at 470.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See supra* Part II.

<sup>64</sup> Stacy Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html>.

<sup>65</sup> *Id.*

<sup>66</sup> *Compare* MASS. GEN. LAWS ch. 149, § 105A(b) (2016) *with* Pub. L. No. 88-38, 77 Stat. 56 and 29 U.S.C. § 206(d)(1).

As an initial matter, the law prohibits an employer from seeking an applicant's prior salary history from the applicant's current or former employer.<sup>67</sup> Once the employer has extended an employment offer, including compensation, to the applicant, however, said applicant can give written authorization to the employer to confirm prior salary history with prior employers.<sup>68</sup> the Massachusetts law makes it unlawful for an employer to prohibit an employee from discussing either the employee's own, or another employee's, wages as a condition of employment.<sup>69</sup> The employer also may not screen applicants by setting a minimum or maximum criteria that the applicant's prior salary or compensation history must satisfy; nor may the employer condition being granted an interview or continued consideration for an offer of employment on the applicant's disclosure of prior salary history.<sup>70</sup> Lastly, the law forbids an employer from firing or otherwise retaliating against an employee because the employee: (1) resisted any action by the employer prohibited under this new law; (2) already did or is about to complain or institute a proceeding against the employer for violating any of the above-mentioned prohibitions; (3) testified or is about to testify or otherwise assist an investigation into violations of the law; or (4) revealed the employee's own salary information or asked about another employee's salary.<sup>71</sup>

The Massachusetts law does grant a degree of reprieve with a safe harbor provision, however, for any employer charged with gender-based wage discrimination.<sup>72</sup> It appears, however, that this safe harbor does not apply where the employer violates the prohibitions on seeking prior salary history.<sup>73</sup> Provided the employer demonstrates that within the last three years the employer had performed a pay practice self-evaluation and has made reasonable progress

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<sup>67</sup> MASS. GEN. LAWS ch. 149, § 105A(c)(3) (2016).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* § 105A(c)(1).

<sup>70</sup> *Id.* § 105A(c)(2).

<sup>71</sup> *Id.* § 105A(c)(4).

<sup>72</sup> *Id.* § 105A(d).

<sup>73</sup> *See* MASS. GEN. LAWS ch. 149, § 105A(d) (2016).

towards eliminating gender-based pay differentials, the employer has an affirmative defense.<sup>74</sup> The employer can design this self-evaluation, but the evaluation must be reasonable in detail and scope relative to the employer's size or consistent with attorney general's standard templates or forms.<sup>75</sup> It is important to note that this safe harbor provision does not apply to an alleged violation of Massachusetts's general gender-based wage discrimination law if the alleged violation occurred prior to the completion of the self-evaluation or six months thereafter.<sup>76</sup> Simplified, Massachusetts's law prohibits employers from conditioning employment on an applicant's disclosure of prior salary history, seeking such salary history information without the consent of the applicant or prior to offering an employment opportunity with compensation, or retaliating against any employee or applicant that opposes such illegal practices.<sup>77</sup>

#### B. The Philadelphia Law

Philadelphia enacted its own prohibition against employers requiring applicants to disclose prior salary history, signed into law by the mayor on January 23, 2017, intended to be effective 120 days later on May 23, 2017.<sup>78</sup> In its findings, the Philadelphia City Council stated: (1) that the gender wage gap still exists in the United States; (2) that this gap has narrowed only by less than half a penny per year since 1963 when the EPA was passed; (3) basing a worker's current wages or salary on prior salary history only perpetuates the gender wage disparity; and (4) salary offers should not be based on prior salary history.<sup>79</sup>

In order to combat the above-mentioned issues, the Philadelphia law makes it unlawful for an employer to: (1) inquire into an applicant's salary history; (2) require the applicant to disclose

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 105A(c)(1)–(4).

<sup>78</sup> PHILADELPHIA, PA., CODE § 9-1131 (2017).

<sup>79</sup> *Id.* § 9-1131(1).

prior salary history; (3) condition employment or consideration for an interview or employment on the applicant disclosing such information; or (4) retaliate against an applicant for refusing to comply with or opposing such salary history inquiries.<sup>80</sup> These prohibitions mirror those of the Massachusetts law described above.<sup>81</sup> Unlike Massachusetts, however, Philadelphia imposes an additional restriction that states an employer cannot rely on salary history at *any stage* in the employment process, such as in negotiating or drafting a contract.<sup>82</sup> The employer may rely on such information provided that the applicant “knowingly and willing disclosed his or her wage history to the employer.”<sup>83</sup> None of these provisions apply to employers following state, federal or local law specifically permitting disclosure or verification of wage history for employment purposes, however.<sup>84</sup> Absent from the Philadelphia law is a safe harbor provision as found in the Massachusetts law,<sup>85</sup> and the Philadelphia statute does not include a provision permitting an employer to seek the applicant’s prior salary history after an offer of employment has been negotiated and extended to the applicant like in Massachusetts and Delaware.<sup>86</sup>

The Philadelphia law imposes the same general prohibitions on an employer requiring an applicant to disclose prior salary history or conditioning consideration for employment on such disclosure, seeking such information from current or prior employers, and prohibiting retaliation against applicants who resist.<sup>87</sup> Philadelphia goes further though, prohibiting an employer from relying on prior salary history unless the applicant reveals such information knowingly and willingly.<sup>88</sup>

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<sup>80</sup> *Id.* § 9-1131(2)(a)(i).

<sup>81</sup> *See supra* Part III(A).

<sup>82</sup> PHILADELPHIA, PA., CODE § 9-1131(2)(a)(ii) (2017).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* § 9-1131(2)(b).

<sup>85</sup> *Compare* PHILADELPHIA, PA., CODE § 9-1131 (2017) *with* G. L. c. 149, § 105A(d).

<sup>86</sup> *Compare* PHILADELPHIA, PA. CODE § 9-1131 (2017) *with supra* Part III(A) and *infra* Part III(D).

<sup>87</sup> PHILADELPHIA, PA., CODE § 9-1131(2)(a)(i)–(ii) (2017).

<sup>88</sup> *Id.* § 9-1131(2)(a)(ii).

### C. The New York City Law

New York City enacted its prohibition against salary history inquiries when the mayor signed it on May 4, 2017, with the effective date being October 31, 2017.<sup>89</sup> The law makes it unlawful for an employer to “inquire about the salary history of an applicant for employment.”<sup>90</sup> “Inquire” means any type of question or statement to the applicant, the applicant’s current or prior employer, or a current or former agent or employee of such employer in any method for the applicant’s salary history.<sup>91</sup> The inquiry definition also extends to searching publicly available records for such information.<sup>92</sup>

Similar to Philadelphia, New York City also prohibits an employer from relying on prior salary history for determining salary, benefits or other compensation to offer to an applicant at any stage of the hiring process.<sup>93</sup> If an applicant, without prompting, voluntarily discloses prior salary history to an employer, its employee or agent, or an employment agent, the prospective employer is free to rely on such information.<sup>94</sup> Furthermore, an employer may discuss with an applicant the applicant’s expectations as to salary, benefits, and other compensation, provided there is no inquiry into prior salary history.<sup>95</sup>

Additionally, like Philadelphia, the law does not apply where federal, state, or local law requires disclosure of such salary history.<sup>96</sup> The New York City law, however, also exempts internal transfers and promotions and public employee positions where salary is guided by

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<sup>89</sup> Brie Kluytenaar, *Update on New York City Legislation Limiting Salary History Inquiries*, THE NAT’L L. REV. (May 10, 2017), <https://www.natlawreview.com/article/update-new-york-city-legislation-limiting-salary-history-inquiries>.

<sup>90</sup> N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(b)(1) (2017).

<sup>91</sup> *Id.* § 8-107(25)(a).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § 8-107(25)(b)(2).

<sup>94</sup> *Id.* § 8-107(25)(d).

<sup>95</sup> *Id.* § 8-107(25)(c).

<sup>96</sup> N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(e)(1) (2017).

collective bargaining procedures.<sup>97</sup> Lastly, where an employer seeks to verify non-salary related information or conduct a background check and discovers salary-related information, the employer has not violated the law, but still may not rely on such information in determining an applicant's offered salary.<sup>98</sup>

New York City's prohibition against salary history inquiries generally mirrors that of Philadelphia on what employer actions are prohibited, but also seems to provide more protections for employers, mainly in allowing discussions about "salary expectations"<sup>99</sup> and shielding the employer for accidental salary history discoveries.<sup>100</sup>

#### D. The Delaware Law

When signing the salary history ban into law, Delaware Governor John Carney was quoted as saying: "All Delawareans should expect to be compensated equally for performing the same work. This new law will help guarantee that across out state, and address a persistent wage gap between men and women."<sup>101</sup> The law went into effect December 14, 2017.<sup>102</sup> Like Massachusetts,<sup>103</sup> Delaware prohibits an employer or an employer's agent from screening applicants based on prior salary history, including requiring prior salary to satisfy either a minimum or maximum criteria.<sup>104</sup> The employer also may not "[s]eek the compensation history of an applicant from the applicant or a current or former employer."<sup>105</sup> Similar to New York

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<sup>97</sup> *Id.* § 8-107(25)(e)(2), (4). "Collective bargaining" is defined as "[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits." *Collective Bargaining*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016).

<sup>98</sup> *Id.* § 8-107(25)(e)(3).

<sup>99</sup> *Id.* § 8-107 (25)(c).

<sup>100</sup> *Id.* § 8-107(25)(e)(3).

<sup>101</sup> Alex Vuocolo, *Delaware First State to Enact Salary History Ban*, DEL. BUS. TIMES (Jun. 15, 2017) <http://www.delawarebusinesstimes.com/delaware-first-state-enact-salary-history-ban/>.

<sup>102</sup> 7 DEL. CODE ANN. tit. 19, § 709(b) (2017).

<sup>103</sup> *See supra* Part III(A).

<sup>104</sup> 7 DEL. CODE ANN. tit. 19, § 709(B)(b)(1).

<sup>105</sup> *Id.* § 709(B)(b)(2).

City,<sup>106</sup> however, an employer may still discuss and negotiate expected compensation with the applicant, provided that there is no request or requirement for the applicant's compensation history.<sup>107</sup> Furthermore, similar to Massachusetts,<sup>108</sup> an employer can seek an applicant's salary history after an employment offer that includes compensation has been extended to the applicant, but differing from Massachusetts, this offer must also be *accepted*.<sup>109</sup> This inquiry is solely for confirming the applicant's prior salary history.<sup>110</sup>

It is important to note that the Delaware law is certainly the barest, least descriptive of the laws enacting prohibitions on salary history inquiries described in this note.<sup>111</sup> This could cause problems for employers, uncertain of what exactly is prohibited and what is allowed. Regardless, the Delaware law does what every other law described in this Comment does: prohibits employers from inquiring into the salary history of an applicant while granting an employer flexibility to make a competitive offer to that applicant.<sup>112</sup>

#### E. The Oregon Law

Oregon's ban on seeking prior salary history goes into effect October 2017; however, the law does not permit civil actions against employers who violate this law until January 2024.<sup>113</sup> Oregon, in its laws prohibiting salary history inquiries, also includes a codification of section 206(d)(1) of the FLSA.<sup>114</sup> Oregon's codification includes a number of exceptions justifying pay

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<sup>106</sup> See *supra* Part III(C).

<sup>107</sup> 7 DEL. CODE ANN. Tit. 19, § 709(B)(d).

<sup>108</sup> See *supra* Part III(A).

<sup>109</sup> 7 DEL. CODE ANN. tit. 19, § 709(B)(e).

<sup>110</sup> *Id.*

<sup>111</sup> Compare 7 DEL. CODE ANN. tit 19, § 709(B) with MASS GEN LAWS. ch. 149, § 105A and PHILADELPHIA, PA., CODE § 9-1131 (2017) and N.Y.C., N.Y., ADMIN. CODE § 8-107(25) and OR. REV. STAT. § 652.220 (2017) and S.F., CAL., MUNICIPAL CODE § 3300J (2017).

<sup>112</sup> 7 DEL. CODE ANN. tit. 19, § 709(B).

<sup>113</sup> Mark A. Crabtree and Claudia A. Halasz, *Oregon Enacts Expansive Pay Equity Law*, NAT'L L. REV. (Jun. 16, 2017) <https://www.natlawreview.com/article/oregon-enacts-expansive-pay-equity-law>.

<sup>114</sup> OR. REV. STAT. § 652.220(2).

disparities between employees of different genders, but as seen in Massachusetts, the catch-all “factor other than sex” language has been removed.<sup>115</sup> The absence of this catch-all language is telling—had Massachusetts or Oregon desired the “factor other than sex” language, it would have been included.

Turning to the salary history-specific enactments, Oregon has made it unlawful for an employer to “[s]creen job applicants based on current or past compensation.”<sup>116</sup> While not explicitly stated, this condition certainly includes the minimum-maximum criteria element as already seen in Massachusetts and Delaware.<sup>117</sup> The law also forbids an employer from using current or past compensation as a factor in determining the compensation offered to a prospective employee.<sup>118</sup> This prohibition, however, does not apply to an employer when a current employee is considered for a transfer, move, or hire to a new position with that same employer.<sup>119</sup> Furthermore, under chapter 659A of the Oregon Revised Statute, an employer cannot seek an applicant’s prior salary history from the applicant or the applicant’s current or former employer.<sup>120</sup> Once the employer has extended an employment offer that includes the amount of compensation, an employer can request written authorization from the applicant to confirm his or her prior salary history.<sup>121</sup> This provision is in line with what Massachusetts and Delaware require.<sup>122</sup>

Oregon, like Massachusetts, also offers a safe harbor provision in its law alleviates an employer from liability under certain conditions; except unlike Massachusetts, this safe harbor

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<sup>115</sup> Compare OR. REV. STAT. § 652.220(2) with MASS. GEN. LAWS ch. 149, § 105A(b), with Pub. L. No. 88-38, 77 Stat. 56 and 29 U.S.C. § 206(d)(1) (1963).

<sup>116</sup> OR. REV. STAT. § 652.220(1)(c).

<sup>117</sup> See *supra* Parts III(A) and (D).

<sup>118</sup> OR. REV. STAT. § 652.220(1)(d).

<sup>119</sup> *Id.*

<sup>120</sup> OR. REV. STAT. § 659A; H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 4 (Or. 2017).

<sup>121</sup> OR. REV. STAT. § 659A; H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 4 (Or. 2017).

<sup>122</sup> See MASS. GEN. LAWS ch. 149, § 105A(c)(3); 7 DEL. CODE ANN. tit. 19, § 709(B)(e) (note that Delaware also requires the offer to be accepted).

does appear to apply to violations of the prohibition against salary history inquiry.<sup>123</sup> It does appear, however, that this safe harbor does not apply to direct violations of the salary history inquiry ban.<sup>124</sup> The employer will be liable neither for compensatory nor punitive damages if, within three years, the employer conducted a good-faith equal-pay analysis reasonable in detail and scope according to the size of the employer and related to the protected class in the suit;<sup>125</sup> the wage disparity must also have been eliminated for the specific plaintiff and the employer must have taken reasonable and substantial steps to eliminate the wage disparity for the protected class overall.<sup>126</sup>

Oregon is ultimately seeking to prohibit employers from screening applicants based on prior salary and using prior salary in determining how much to offer an applicant,<sup>127</sup> as well as seeking this information from the applicant or the applicant's current or former employer.<sup>128</sup> But the employer also has a degree of leeway; an employer is allowed to confirm prior salary after extending a job offer which includes compensation<sup>129</sup> and the employer is protected by a safe harbor provision.<sup>130</sup>

#### F. The San Francisco Law

In almost identical language to the Philadelphia law, the San Francisco City Council found that: (1) women in San Francisco suffer from a gender wage gap; (2) the gender wage gap has narrowed less than half a penny per year since the 1963 enactment of the EPA; (3) seeking prior salary history contributes to the wage gap by perpetuating wage inequalities; (4) women are put at

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<sup>123</sup> Compare H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 12 (2017) with MASS. GEN. LAWS ch. 149, § 105A(d).

<sup>124</sup> See H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 12 (Or. 2017)

<sup>125</sup> *Id.* § 12(1)(a)(A)–(B).

<sup>126</sup> *Id.* § 12(b) (Or. 2017).

<sup>127</sup> OR. REV. STAT. § 652.220(1)(c)–(d).

<sup>128</sup> OR. REV. STAT. § 659A; H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 4 (Or. 2017).

<sup>129</sup> OR. REV. STAT. § 659A; H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 4 (Or. 2017).

<sup>130</sup> H.B. 2005, 79th Legis. Assemb., Reg. Sess., § 12 (Or. 2017).

a disadvantage in negotiating salary when required to disclose prior salary history; (5) prior salary history is unlikely to not be a factor in negotiating or setting a salary offer; (6) the new law will ensure that a woman’s prior wage will not weigh down her earnings throughout her career; and (7) the new law will ensure employees and employers negotiate salaries based on qualifications rather than prior salary history.<sup>131</sup>

Turning to the law itself, an employer is prohibited from inquiring into an applicant’s prior salary history,<sup>132</sup> with “inquire” meaning any direct or indirect form of communication in any type of means to gather this information from the applicant.<sup>133</sup> Further, an employer cannot consider an applicant’s prior salary history in determining what salary to offer, *regardless* of whether the applicant discloses the prior salary history voluntarily.<sup>134</sup> This is a sharp deviation from the exceptions included in both the Philadelphia and New York City laws.<sup>135</sup> Also, San Francisco, as displayed in previously discussed laws, prohibits an employer from refusing to hire or in any other way retaliating against an applicant for refusing to disclose prior salary history.<sup>136</sup>

In another unique feature of the law, San Francisco also imposes liability on current and former employers, as a current or former employer cannot release the salary history of a current or former employee to said employee’s current or prospective employer without written authorization from the employee.<sup>137</sup> Only San Francisco imposes such a restriction on current or previous employers.<sup>138</sup> Lastly, an applicant can voluntarily disclose his or her prior salary history after an

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<sup>131</sup> S.F., CAL. MUNICIPAL CODE § 3300J.2(a)–(d), (l)–(m) (2017).

<sup>132</sup> *Id.* § 3300J.4(a).

<sup>133</sup> *Id.* § 3300J.3.

<sup>134</sup> *Id.* § 3300J.4(b).

<sup>135</sup> *Compare id.* with PHILADELPHIA, PA., CODE § 9-1131(2)(a)(ii) (2017) and N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(d).

<sup>136</sup> S.F., CAL., MUNICIPAL CODE § 3300J.4(c).

<sup>137</sup> *Id.* § 3300J.4(d).

<sup>138</sup> *See supra* Parts III(A)–(E).

employer makes an initial salary offer to negotiate a different salary.<sup>139</sup> Only then may an employer use such a disclosure, but strictly as it relates to making a counter-offer.<sup>140</sup> While San Francisco imposes many of the provisions already enacted by other cities and states, it is certainly the strictest, most pro-employee of the laws in light of the provision prohibiting an employer from considering prior salary history after an applicant makes a voluntary disclosure and the provision imposing liability on an employer revealing the information instead of just on the employer seeking the information.

#### G. The California Law

A bill, intending to narrow the gender wage gap by prohibiting employers from asking about prior salary history was introduced in California.<sup>141</sup> Whether it would be signed into law was unclear, however, as the Governor of California, Jerry Brown, had vetoed a bill implementing the same laws two years earlier after being pressured by business groups.<sup>142</sup> At the time, the governor was quoted as saying that the law prevented employers ““from obtaining relevant information with little evidence that this would assure more equitable wages.””<sup>143</sup> The measure in 2015, however, had no G.O.P. support and received not one G.O.P. vote, whereas the more recent bill was co-authored by two Republicans and the bill garnered ten G.O.P. votes.<sup>144</sup> The bill did have opposition from powerful business groups as the Chamber of Commerce has gathered together an extensive coalition of detractors.<sup>145</sup>

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<sup>139</sup> S.F., CAL., MUNICIPAL CODE § 3300J.4(e).

<sup>140</sup> *Id.*

<sup>141</sup> Margot Roosevelt, *Previous Salary? Soon, the Question Might Be Illegal in California*, THE MERCURY NEWS (Sept. 11, 2017), <http://www.mercurynews.com/2017/09/11/previous-salary-soon-the-question-might-be-illegal/>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

The Governor signed the bill into law on October 12, 2017.<sup>146</sup> An employer is now prohibited from relying on an applicant’s salary history as a factor for deciding whether to offer the applicant a job or how much to pay.<sup>147</sup> The employer also may not seek such salary history information, whether it be oral or in writing, in person or through an agent, of an applicant.<sup>148</sup> An applicant may voluntarily disclose his or her salary history information, and once an applicant does so, an employer is free to consider and rely on that information for determining an applicant’s offered salary.<sup>149</sup> These prohibitions will not apply to any salary history information that is disclosable according to state or federal law,<sup>150</sup> but are enforceable against “all employers, including state and local government employers and the Legislature.”<sup>151</sup> The bill went into effect on January 1, 2018.<sup>152</sup>

#### **IV. The Backlash, Implications, and Outlook in the Wake of these Laws**

##### **A. The Legal Backlash**

These laws have faced backlash, however, including the Philadelphia ordinance that is now being challenged in court; the Chamber of Commerce of Greater Philadelphia<sup>153</sup> has brought suit

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<sup>146</sup> Margot Roosevelt, *California Bosses Can No Longer Ask You About Your Previous Salary*, THE ORANGE COUNTY REG. (Oct. 13, 2017), <http://www.ocregister.com/2017/10/12/in-bid-to-fight-gender-pay-gap-gov-jerry-brown-signs-salary-privacy-law/>.

<sup>147</sup> CAL. LAB. CODE § 432.3(a) (West 2017).

<sup>148</sup> *Id.* § 432.3(b).

<sup>149</sup> *Id.* § 432.3(g)–(h).

<sup>150</sup> *Id.* § 432.3(e).

<sup>151</sup> *Id.* § 432.3(f).

<sup>152</sup> David Lazarus, *From Weed to Wages, the New Year Ushers in New Laws Affecting Consumers*, L.A. TIMES (Jan. 2, 2018), <http://www.latimes.com/business/lazarus/la-fi-lazarus-new-california-laws-20180102-story.html>.

<sup>153</sup> A chamber of commerce is an association of businesses for a geographic area that seeks to further the collective interests of the group. *What Is a Chamber*, ASS’N OF CHAMBER OF COMM. EXECUTIVES, <https://secure.acce.org/whatisachamber/>. Business owners voluntarily form these associations in order to advocate for economic growth and business interests. *Id.*

to strike down the ordinance.<sup>154</sup> Experts believe this suit “may set the tone for future litigation over pay-history laws elsewhere.”<sup>155</sup>

In its complaint, the Chamber stated that rather than achieve gender wage equality, the law “will chill the protected speech of employers and immeasurably complicate their task of making informed hiring decisions.”<sup>156</sup> The Chamber, in its main argument, asserted that the ordinance violates employers’ First Amendment rights to free speech because it is both over- and under-inclusive,<sup>157</sup> and that the ordinance violates both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.<sup>158</sup> As to the First Amendment, the Chamber alleges that the ordinance imposes both content-based and speaker-based restrictions on employers’ speech because employers, and only employers, are prohibited from asking about prior salary history.<sup>159</sup> Also, prohibiting employers from seeking such information is a content-based restriction on employers’ speech, which can only withstand strict scrutiny when the restriction serves a compelling state interest.<sup>160</sup> The Chamber alleges the law serves no compelling interest because while Philadelphia has a compelling interest in eliminating pay disparities based on gender discrimination, that interest does not extend to wage differences based on factors such as skill or training, which the Chamber believes the new law covers.<sup>161</sup> The complaint further alleges that the ordinance violates the Due Process Clause because the ordinance is impermissibly vague by

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<sup>154</sup> Dan Packel, *Pay Inquiry Bans to Get Crucial First Test in Philly*, Law360 (Apr. 10, 2017), <https://advance.lexis.com/document/?pdmfid=1000516&crd=45714273-4743-4850-9fe1-b40c4bc8aa5a&pdworkfolderid=b41c96b8-1a14-4743-adb1-bcacd81ec3f8&ecomp=txptk&earg=b41c96b8-1a14-4743-adb1-bcacd81ec3f8&prid=ec5d1f6e-79b0-4046-99fe-879eba00ef0c>.

<sup>155</sup> *Id.*

<sup>156</sup> Complaint at 2, *Chamber of Commerce v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. Apr. 3, 2017).

<sup>157</sup> *Id.* at 3–4.

<sup>158</sup> *Id.* at 5–6.

<sup>159</sup> *Id.* at 13.

<sup>160</sup> *Id.* at 14.

<sup>161</sup> *Id.* at 15.

failing to define key terms;<sup>162</sup> and it violates the Commerce Clause because the law extends to any employer that either employs at least one employee in Philadelphia or transacts business in Philadelphia, even if that employer is in another state.<sup>163</sup> Based on these allegations, the Chamber has requested preliminary and permanent injunctions to prevent Philadelphia from enforcing the ordinance.<sup>164</sup>

After receiving the Chamber's complaint, on April 19, 2017, the judge stayed the effective date of the ordinance pending the outcome of the Chamber's motion for a preliminary injunction.<sup>165</sup> In order to avoid confusion, the city agreed to the stay for employers and employees as the legal process moves forward.<sup>166</sup> On May 30, 2017, however, Judge Mitchell S. Goldberg, presiding over this litigation, found that the Chamber of Commerce failed to demonstrate with specific facts that one or more of its members will be directly affected by Philadelphia's ordinance so as to establish standing.<sup>167</sup> Without such facts, the court cannot determine whether any of the individual members would have standing to bring suit; since the Chamber could not show that at least one of its members would have standing to sue, the Chamber itself does not have standing to sue, and the judge granted the City's motion to dismiss.<sup>168</sup> The matter was dismissed, however, without prejudice, and the Chamber was granted leave to amend its complaint within fourteen days of the order.<sup>169</sup>

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<sup>162</sup> Complaint at 17, Chamber of Commerce v. City of Philadelphia, No. 2:17-cv-01548 (E.D. Pa. Apr. 3, 2017).

<sup>163</sup> *Id.* at 19–20.

<sup>164</sup> *Id.* at 27.

<sup>165</sup> Michael Tanenbaum, *Philly Salary History Bill Put on Hold Amid Legal Challenge*, PHILLYVOICE (Apr. 24, 2017), <http://www.phillyvoice.com/philly-wage-equity-bill-put-hold-amid-legal-challenge/>. The effective date of the ordinance was May 23, 2017. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Chamber of Commerce v. City of Philadelphia, No. 2:17-cv-01548 (E.D. Pa. May 30, 2017) (granting the City's motion to dismiss).

<sup>168</sup> *Id.* at p. 9–10.

<sup>169</sup> *Id.* at p. 10.

On June 13, 2017, the Chamber filed its amended complaint, alleging the same constitutional violations as before; however, this time the amended complaint included an extensive outline of the ways that the ordinance will harm certain particular enumerated members as exemplars for the group as a whole.<sup>170</sup> Philadelphia did not file a motion to dismiss the amended complaint, so this lawsuit will be decided on the merits.<sup>171</sup> Being a case of first impression, the result of this lawsuit could resonate throughout the country with other state and city legislatures enacting, or considering enacting, other similar salary history bans.<sup>172</sup>

## B. The Legislative Pushback

### a. *The Illinois Veto*

Rather than enact legislation similar to the ones seen above,<sup>173</sup> the Governor of Illinois vetoed a bill that would prohibit employers from asking about an applicant's prior salary history.<sup>174</sup> The Governor stated his support for eliminating the gender wage gap, but suggested a bill more closely modeled after the Massachusetts law that would provide employers with more leeway.<sup>175</sup> The Illinois bill did not include the caveat, as found in the Massachusetts bill, that an employer could seek prior salary history after offering a candidate the job with a salary.<sup>176</sup> There was disappointment in the Governor vetoing the bill, but the indication that the Governor recognizes

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<sup>170</sup> Amended Complaint at 14-22, *Chamber of Commerce v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. June 13, 2017).

<sup>171</sup> Stephanie J. Peet and Timothy M. McCarthy, *Philadelphia's Wage-History Ordinance Faces First Amendment Challenge*, WASH. LEGAL FOUND. (Jul. 21, 2017), <https://wfllegalpulse.com/2017/07/21/philadelphias-wage-history-ordinance-faces-first-amendment-challenge/>.

<sup>172</sup> *Id.*

<sup>173</sup> *See supra* Part III.

<sup>174</sup> Alexia Elejalde-Ruiz, *Rauner Vetoes Bill That Would Bar Employers from Asking About Salary History*, CHI. TRIB. (Aug. 28, 2017), <http://www.chicagotribune.com/business/ct-illinois-no-salary-history-bill-veto-0829-biz-20170828-story.html>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

the existence of a gender wage gap and that a prohibition on asking about prior salary history could eliminate it is encouraging to supporters of the bill.<sup>177</sup>

Instead of re-working the bill, those in favor of the bill planned to override the Governor's veto legislatively in the November veto session.<sup>178</sup> The initial bill passed in the House by a vote of 91-24 and passed in the Senate by a vote of 35-18 (with one member voting present).<sup>179</sup> The override requires seventy-one votes in the House and thirty-six votes in the Senate, and a Republican representative expressed his optimistic belief that the override effort will be successful due to the bill's strong bi-partisan support.<sup>180</sup> On November 9, 2017, however, when the Illinois Senate attempted to override Governor Rauner's veto, it failed to do so.<sup>181</sup> The Illinois House had successfully overridden the veto 80-33, but the Illinois Senate vote, needing three-fifths of members (thirty-six members) to vote in favor of the override, only garnered twenty-nine "yeas," seventeen "nays," and one "present."<sup>182</sup> At this point, it is unclear what will happen in Illinois regarding a prohibition against salary history inquiries, but the attempt to enact such legislation signals the growing desire for such prohibitions.

*b. The New Jersey Veto*

In the Summer of 2017, the New Jersey legislature put forward an amendment to the New Jersey Law Against Discrimination (NJLAD) that would have enacted similar salary history bans as seen above.<sup>183</sup> The law would have prohibited employers from: (1) inquiring about an

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Elejalde-Ruiz, *supra* note 174.

<sup>181</sup> L. Robert Batterman, Emilie Adams, and Alex C. Weinstein, *Illinois Senate Fails to Override Governor's Veto of Salary History Ban*, NAT'L L. REV. (Nov. 16, 2017), <https://www.natlawreview.com/article/illinois-senate-fails-to-override-governor-s-veto-salary-history-ban>.

<sup>182</sup> *Id.*

<sup>183</sup> Micala Campbell Robinson, *A Woman's Worth: Closing the Gender Pay Gap*, No. 34 Vol. 223 NEW JERSEY L. J. (Aug. 21, 2017) <https://advance.lexis.com/document/?pdmfid=1000516&crd=4db8f2d3-bb46-4892-9062->

applicant's compensation and benefit history at any point during the hiring process; (2) screening a candidate based on his or her prior salary or benefits history; (3) using that prior salary history to make pay determinations; and (4) retaliating against an employee who shared terms and conditions of employment, like compensation, with other current or former employees.<sup>184</sup> A candidate could volunteer prior salary history, at which point the employer could verify the information, provided that there was no employer coercion and the candidate gave written authorization for the inquiry.<sup>185</sup>

Chris Christie, then-Governor of New Jersey, vetoed this bill on July 25, 2017 because he felt that the law would punish inquiries made without discriminatory intent or impact in contradiction to the NJLAD.<sup>186</sup> Governor Christie indicated receptiveness to consideration of a bill that could protect against wage discrimination without being hostile to business.<sup>187</sup> There was an expectation that once Governor Christie was out of office in early 2018, the legislature would again introduce the same or a similar bill.<sup>188</sup> Phil Murphy, a Democrat, defeated Republican Kim Guadagno in the New Jersey gubernatorial election and took office January 16, 2018.<sup>189</sup> Governor Murphy has already pledged to sign pay equity legislation into law, nearly assuring that New Jersey will have new pay equity laws, although the specifics of such legislation is not known.<sup>190</sup>

### C. What's on the Horizon?

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Sean D. Dias, *New Jersey Employers Get Reprieve from Salary History Ban*, SCARINCI HOLLENBECK (Aug. 17, 2017), <https://scarincihollenbeck.com/law-firm-insights/labor-employment/salary-history-bill-vetoed/>.

<sup>189</sup> Brent Johnson and Susan K. Livio, *Next Up for Phil Murphy: His Transition to Power. Here's How It Works*, TRUE JERSEY (Nov. 8, 2017), [http://www.nj.com/opinion/index.ssf/2018/01/in\\_baiting\\_amazon\\_nj\\_should\\_get\\_its\\_economic\\_incen.html](http://www.nj.com/opinion/index.ssf/2018/01/in_baiting_amazon_nj_should_get_its_economic_incen.html).

<sup>190</sup> Suzanne Herrmann Brock, Elizabeth Cowit and Brittany E. Grierson, *The Push for Pay Equity Legislation in New Jersey*, NEW JERSEY L. J. (Dec. 4, 2017), <https://www.law.com/njlawjournal/sites/njlawjournal/2017/12/04/the-push-for-pay-equity-legislation-in-new-jersey/?slreturn=20180008160249>.

New York City Public Advocate Letitia James expects a legal challenge from business groups like what occurred in Philadelphia.<sup>191</sup> James expects likely litigation because of the pushback the New York City law received from trade associations like the U.S. Chamber of Commerce.<sup>192</sup> She was quoted as saying, “I suspect that someone will probably file a lawsuit,” adding, “Whenever you make any change and move the needle forward, it’s inevitable that some individuals will push back.”<sup>193</sup> As of writing, there is no indication that any suit has been filed challenging the New York City law.<sup>194</sup>

#### D. A National Ban on Prior Salary History Inquiries

On May 11, 2017, Representative Eleanor Holmes Norton, a Democrat from the District of Columbia, introduced a bill to amend the FLSA to prohibit certain practices by employers regarding prior salary history, cited as the “Pay Equity for All Act of 2017.”<sup>195</sup> This Act would introduce a new section, section 8, to the FLSA making it unlawful for an employer to: (1) screen prospective employees based on prior salary history in such ways as (a) requiring that prior salary meet a minimum or maximum criteria, (b) requesting or requiring prior salary history as a condition of being interviewed, or (c) conditioning continued consideration for an offer of employment on the disclosure of prior salary history;<sup>196</sup> (2) seek an applicant’s prior salary history from any current or former employer of the applicant;<sup>197</sup> and (3) fire or retaliate against a current or prospective employee for: (a) opposing any of the practices made unlawful above, (b) nearing the process of making a complaint against the employer for violations of this act, or (c) testifying

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<sup>191</sup> Vin Gurrieri, *NYC Pay History Ban May Face Legal Challenge*, *Official Says*, LAW 360 (Apr. 5, 2017).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> It is likely that opponents of these salary history bans are waiting to see what will happen with the Philadelphia litigation in order to see whether challenging these laws will be successful.

<sup>195</sup> H.R. 2418, 115th Cong. (2017).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

or is about to testify, assist, or participate in an investigation relating to the prohibited conduct.<sup>198</sup> Since being referred to the House Committee on Education and the Workforce on the same day as the bill was introduced, there has been no further action on the Pay Equity for All Act of 2017.<sup>199</sup>

## V. Achieving the EPA’s Goals and Changing the Courts’ Analysis

In enacting these laws, either the laws themselves or the lawmakers signing them have hinted at one of the reasons for the enactment of such measures: the EPA has failed to accomplish what it set out to do. The Philadelphia law acknowledges the dismal lack of narrowing in the gender wage gap since the passage of the EPA, and relying on prior salary history perpetuates wage inequalities.<sup>200</sup> Bill de Blasio, Mayor of New York City, was quoted saying, “It is unacceptable that we’re still fighting for equal pay for equal work. The simple fact is that women and people of color are frequently paid less for the same work as their white, male counterparts.”<sup>201</sup> He followed with, “This Administration has taken bold steps to combat the forces of inequality that hold people back, and this bill builds upon the progress we have made to close the pay gap and ensure everyone is treated with the respect they deserve.”<sup>202</sup> The Mayor of Delaware echoed a similar sentiment as Mayor Bill de Blasio when signing the Delaware law into legislation.<sup>203</sup> As previously mentioned, noticeably absent from Oregon’s law outlining the bona fide reasons for a pay disparity is the vague language of “factor other than sex,” in addition to banning prior salary history.<sup>204</sup> This suggests an awareness that employers have been utilizing the prior salary history and “factors other than sex” at large to perpetuate gender wage discrimination. The San Francisco

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<sup>198</sup> *Id.*

<sup>199</sup> H.R. 2418, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/2418/all-actions>.

<sup>200</sup> PHILADELPHIA, PA., CODE § 9-1131(b), (d) (2017).

<sup>201</sup> *Mayor de Blasio Signs Bill Prohibiting All NYC Employers from Inquiring About Salary History of Job Applicants*, NYC (May 4, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/285-17/mayor-de-blasio-signs-bill-prohibiting-all-nyc-employers-inquiring-salary-history-job#/0>.

<sup>202</sup> *Id.*

<sup>203</sup> Vuocolo, *supra* note 101..

<sup>204</sup> OR. REV. STAT. § 652.220(2)(a)–(i).

law stated the same findings as Philadelphia, hinting at a failure of the EPA and how reliance on prior salary history perpetuates gender wage inequality, including findings related to *Rizo* regarding how relying solely on salary history would be in opposition to the goals of Congress in enacting the EPA.<sup>205</sup> Governor Jerry Brown of California even described the “simple question” of prior salary as being a “barrier to equal pay.”<sup>206</sup> Explicitly or implicitly, lawmakers are accelerating the goals of the EPA prohibitions against salary history inquiries, no longer acquiescing to the tortoise-like pace of historical progress.

Furthermore, it is incredibly difficult to determine whether an employer’s reliance on prior salary history is genuine or a pretext for taking advantage of discriminatory wage practice, or even if the applicant’s prior salary was based on sexual discrimination.<sup>207</sup> And although circuit courts acknowledge the potential for employers exploiting prior salary history as a “factor other than sex,” the circuit courts continue to uphold its use as an affirmative defense, albeit without any uniformity to its application.<sup>208</sup> Another clear, albeit unspoken, goal of these state and municipal legislatures is to eliminate prior salary history as a “factor other than sex” in its entirety so as to remove it from a court’s consideration when hearing a sex-based wage discrimination claim. While a “factor other than sex” defense is still available, prior salary history will no longer serve as an easily identifiable card for employers to play in the states and cities where the laws have been enacted.

Businesses will certainly lose one key factor used in the hiring process, making offering and negotiating a salary more difficult, especially to high-ranking executives.<sup>209</sup> Proponents of the

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<sup>205</sup> S.F., CAL. MUNICIPAL CODE § 3300J.2(b)–(c), (h).

<sup>206</sup> Roosevelt, *supra* note 146.

<sup>207</sup> Hamburg, *supra* note 18 at 1090; *Kouba*, 691 F.2d at 876; *Covington*, 816 F.2d at 322–23.

<sup>208</sup> *See supra* Part II.

<sup>209</sup> *See supra* Part IV(A); Roosevelt, *supra* note 141; Elejalde-Ruiza, *supra* note 174; Gene Marks, *New Jersey May Join Philadelphia in Banning Employers from Asking New Hires About Salary History*, WASH. POST (Jun. 27, 2017),

law, however, recognize that this will lead to more hiring decisions based on merit.<sup>210</sup> Businesses still have education, experience, recommendations, references, aptitude tests, etc. to determine if a candidate is a proper fit for the job. And, most of these laws do not fully eliminate the ability of an employer from asking about prior salary history or negotiating once a candidate has voluntarily disclosed such salary history.<sup>211</sup> Eliminating prior salary history as a “factor other than sex” greatly increases the chances of further closing the wage gap and protecting women from wage discrimination while leaving businesses no worse off than before.

## **VI. Resolving the Circuit Split while the Legislatures Act**

Even while federal, state, and town legislatures push to enact their own versions of a salary history inquiry prohibition, those states and towns without such legislation will be bound to the analysis of the circuit court of the circuit in which they are located. As such, the differing analyses should be evaluated and resolved. The reasoning of the Tenth and Eleventh Circuits, that prior salary history alone cannot be the sole justification as a “factor other than sex,”<sup>212</sup> is flawed because nothing in the EPA or FLSA suggests this standard. The list of exceptions that the EPA added to the FLSA are separated with an “or” and in the “factor other than sex” language, “factor” is singular.<sup>213</sup> This construction suggests that an employer need only show *one* of the enumerated exceptions, and within the catch-all provision, need only show *one* factor other than sex. By insisting that employers show prior salary history and an additional factor, the Tenth and Eleventh Circuits are imposing a higher burden on employers facing EPA and FLSA wage-discrimination challenges.

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[https://www.washingtonpost.com/news/on-small-business/wp/2017/06/27/new-jersey-may-join-philadelphia-in-banning-employers-from-asking-new-hires-about-salary-history/?utm\\_term=.2dcfd1ceee09](https://www.washingtonpost.com/news/on-small-business/wp/2017/06/27/new-jersey-may-join-philadelphia-in-banning-employers-from-asking-new-hires-about-salary-history/?utm_term=.2dcfd1ceee09).

<sup>210</sup> *Id.*

<sup>211</sup> Of the laws discussed above, only San Francisco’s law prohibits an employer from relying on a candidate’s prior salary history entirely, even after the candidate has voluntarily disclosed such information. *See supra* Part III(F).

<sup>212</sup> *See supra* Part II(B).

<sup>213</sup> Pub. L. No. 88-38, 77 Stat. 56, 57 (1963); 29 U.S.C. 206(d)(1) (1963).

Further, the reasoning of the Seventh Circuit, that prior salary history is a valid “factor other than sex” unless there is a showing that the prior salary was the result of gender discrimination,<sup>214</sup> while more reasonable, is too lenient. This approach does not conduct an inquiry into the current employer’s potential invidious behavior but determining whether or not the prior employer engaged in gender-based wage discrimination is a daunting task for employees asserting a violation of the FLSA. The approach taken by the Seventh Circuit, affording employers more discretion than the Tenth and Eleventh Circuits, affords employers *too* much discretion.

This leaves the last approach taken by the circuit courts as the best approach when resolving a plaintiff’s gender-based wage discrimination claim—that taken by the Eighth and Ninth Circuits. Those circuits conduct a reasonableness inquiry into the employer’s use of prior salary history as a factor other than sex or ask whether a reliance on prior salary history effectuates a business policy.<sup>215</sup> This analysis is squarely in the middle of the two approaches mentioned above, imposing less of a burden than the Tenth and Eleventh Circuits do, but affording employers less discretion than the Seventh Circuit does. The approach of the Eighth and Ninth Circuits keeps both parties’ interests in mind, suspicious of an employer’s reliance on prior salary history, but willing to accept the idea that an employer innocently uses prior salary history as a legitimate factor in determining an employee’s pay. So, until prior salary history prohibitions are enacted throughout the country, district courts and circuit courts should adopt the Eighth and Ninth Circuit’s reasoning in evaluating claims arising under the FLSA involving prior salary history.

## **VII. Conclusion**

Congress enacted the EPA with the intention of eliminating gender-based wage discrimination. In order to protect employers, however, this Act listed exceptions, one of which

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<sup>214</sup> See *supra* Part II(D).

<sup>215</sup> See *supra* Part II(C).

is a “factor other than sex.” Numerous circuit courts acknowledge that prior salary history is a “factor other than sex,” varying by how much weight the courts give to that factor alone, despite the recognition that prior salary history can be exploited and abused to continue gender-based wage discrimination. Unsatisfied with the current pace of progress regarding equal pay, and unwilling to let this matter play out in the judiciary, multiple legislatures around the country have enacted legislations prohibiting inquiries into prior salary history. By their own words, lawmakers appreciate that the EPA alone is not getting the job done and recognize inquiries into prior salary history stand as an obstacle to full pay equality for equal work. This march of progress is moving rapidly and will not stop until prior salary history is eliminated as a “factor other than sex” in its entirety across the country. As a result, employers will no longer be allowed to disguise gender-based pay discrimination as an innocent reliance on prior salary history.