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Wage History Bans: Considerations for Every Employer

Designed to address the gender and race-based pay gap, wage history bans continue to gain traction. The laws typically ban employers from inquiring regarding applicant wage history and setting compensation based on even voluntarily disclosed wage history. Wage history inquiry bans exist throughout the U.S., currently in 17 states and 20 cities (<https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>). More proposed laws are on the way.

Wage history bans are surviving legal challenges. As previously reported (<https://www.stradley.com/insights/publications/2017/01/employment-newsflash-january-24-2017>), Philadelphia became the first city in the U.S. with a wage history ban in 2017. However, the key provisions of the law banning inquiring about wage history remained on hold pending legal challenges (<https://www.stradley.com/insights/publications/2018/05/employment-newsflash-may-1-2018>). A recent court decision (<https://www.stradley.com/-/media/files/publications/2020/02/stradley-ronon-newsflash-pdf.pdf>) cleared the way for enforcement of the entire ordinance. Timeline for enforcement has not yet been set, and it remains uncertain whether legal challenges will continue.

In a strong job market, many employers are revisiting their recruiting and hiring practices to determine the role of compensation history in hiring and advancement. Current trends and considerations in light of recent legal developments include:

- **Employer Transparency.** Determine the market value of the position in advance, with ranges to allow for negotiation if necessary. Consider sharing compensation ranges as appropriate with applicants at the start of the process, so that the company can focus on realistically identifying the candidate with the best skillset within the compensation range, rather than chasing candidates too far outside of the range. Early transparency also allows employers to potentially hear from candidates if their salary expectations are misaligned with the position.
- **Enhanced Screening Processes.** Identify one or two designated individuals to discuss and negotiate compensation with candidates. Make clear to other interviewers they should not initiate compensation discussions or engage in meaningful compensation discussions. When developing processes, consider not only the current law but the trend nationwide. For example, many of the new laws (a) ban questions not only about salary but also bonuses, commissions, and other fringe benefits; (b) prohibit both direct inquiries but also more subtle prompting and (c) include limited carve-outs for completely voluntary disclosure or inquiries required by law.

- **Uniform Procedures.** Many multi-state employers forego tracking each new wage history ban and instead adopt a uniform procedure eliminating such inquiries, even if not legally required to do so in every location. Employers continue to scrub basic job application questions regarding prior compensation. However, certain categories of positions may require exceptions or different procedures within the organization; for example, certain regulated industries may by law require employers to gather wage history information.
- **Post-Hire Compensation.** Many of the wage history ban laws prohibit using prior wage history to set compensation after employment (e.g., “She earned \$50,000 at her prior job and we pay her \$60,000, so we do not need to consider adjusting her compensation for several more years”). Other laws expand protections to mandate equal pay for similar work beyond the requirements that already exist under federal law. Consider how the business adjusts compensation for the duration of employment and decide whether a compensation audit makes sense



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to identify any potential legal risks concerning compensation practices.

Whether subject to a current wage history ban or not, employers should anticipate a continued focus on compensation practices from not only a legal but recruiting and retention perspective.

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