

Why Job Applicants Should Not Be Asked About Their Salary History

By Ian-Paul Poulos

In recent years, there has been a noticeable push at the federal, state, and local level to prohibit employers—both public and private—from asking job applicants about their salary history out of fear of perpetuating discriminatorily low wages historically paid to women. This article examines New York City’s new salary disclosure law against the backdrop of the federal Equal Pay Act and by comparison to similar laws passed by other jurisdictions, weighing pros and cons in the process.

On August 10, 2016, New York City Public Advocate Letitia James announced the introduction of a bill before the New York City Council that would prohibit employers from asking job applicants about their salary history.¹ The proposed legislation built on an April 2016 report from Public Advocate James that urged employers to discontinue the practice, citing New York State’s 13 cent gender wage gap and statistics demonstrating wage disparities for non-white, New York City females notably worse than the national average.² According to the report, New York City’s municipal government is not immune to the gender gap either: “[w]omen employed in New York City’s municipal government face a gender wage gap that is three times larger (18 percent) than the gap experienced by women working in the private for-profit sector (six percent).”³

In November of the same year, following the Public Advocate’s report, NYC Mayor Bill de Blasio signed Executive Order 21, which maintains that “[New York] City agencies shall not make any inquiry regarding the pay history of an applicant for employment with such agencies,” except under certain specific circumstances.⁴ A City employer may inquire about prior salary history after a conditional offer of employment has been made. Such inquiries are also permissible for verification purposes; if the applicant makes affirmative statements about his or her salary at a place of prior employment, the City employer may verify those representations, but relying on the applicant’s pay history in making an offer of employment is still prohibited.

At the turn of the New Year, on January 10, 2017, New York Governor Cuomo joined the prior salary discussion at the state level, citing the aforementioned statistics indicating that women in New York State earn only 87 cents to every male earned dollar for

performing the same work. In taking a step to remedy the disparity, the Governor signed Executive Order 161, which maintains that in an effort “to promote consideration of applicants based on their unique aptitude and qualifications, no State entity is permitted to ask, or mandate, in any form, that an applicant for employment provide his or her current compensation, or any prior compensation history, until such time as the applicant is extended a conditional offer of employment with compensation.”⁵ Governor Cuomo’s order operates in the same manner as Mayor de Blasio’s and includes the same exceptions.

It is important to note that the executive orders issued by Mayor de Blasio and Governor Cuomo only apply to the public sector. As it currently stands, New York City and State government employers cannot inquire about an applicant’s salary history before extending an offer of employment; salary verification is permissible if the applicant makes the first move by voluntarily mentioning his or her salary, but even if the government employer knows the applicant’s salary, it is impermissible to rely on that information in structuring an employment offer to the applicant.

To expand these kinds of protections to the private sector, legislation is necessary, which is why proposed bills banning employers from asking about an applicant’s prior salary are crucial. The focus of this Article will be on the Public Advocate’s Int. 1253-A, which passed in the City Council on April 5, 2017. This Article will proceed in the following fashion. Part I will set the scene by providing the context leading up to the salary history law. Part II will explain the New York City law, comparing and contrasting its provisions with those of other similar laws in the United States. Part III will analyze the common arguments offered against salary history laws. Part IV will offer concluding thoughts.

PART I: SALARY HISTORY DILEMMA The Equal Pay Act

The Equal Pay Act of 1963 (EPA) was passed as an amendment (Section 6(d)) to the Fair Labor Standards Act of 1938. The Civil Rights Act of 1964 was passed just one year later without much clarification concerning the interaction of the two statutes. As a preliminary matter, remember that both Title VII, which is part of the Civil Rights Act, and the EPA prohibit sex discrimination.

While Title VII offers broader protections because it is not limited to sex-based pay discrimination and does not have an “equal work” requirement, which will be explained briefly below, the EPA has more generous remedial provisions and an arguably more plaintiff-friendly burden allocation.

To bring an EPA claim, the plaintiff carries the burden of proving four elements: (1) two opposite sex employees working for a covered employer must (2) work in the same “establishment” and (3) engage in “equal work” while (4) receiving unequal pay.⁶ Critically, the employer’s intent is unnecessary in proving these elements, so whether the employer *purposefully* or *knowingly* paid women less than men for performing the same job is legally gratuitous information.

For the sake of clarity, it is worth quickly addressing these four elements. First, “two opposite sex employees” means that the EPA applies to both men and women equally. Either sex can sue so long as he or she has a claim fitting within the remaining elements. Furthermore, a “covered” employer simply means that the employer must fall within the auspices of the EPA. For the purposes of this Article, assume that all the employers discussed below are covered employers. Second, consider an “establishment” to be the place where an employee works for the employer. If an employer owns many different physical locations, it becomes more difficult to show that all of those locations fall within the definition of one “establishment.” But ignore these complications when reading below because such details are beyond the scope of this Article. Third, “equal work” does not mean “identical work.” To prove the EPA claim, the plaintiff employee must find someone of the opposite sex with whom to compare him or herself. In doing so, that “comparator” must have a job that requires the performance of *substantially* equal work. To demonstrate “equal work,” four sub-requirements must be met. The EPA’s “equal work” requirement is satisfied when two jobs involving equal skill, effort, and responsibility “are performed under similar working conditions.”⁷ Lastly, pay is unequal when employees are paid at different rates; an employer is prohibited from “paying wages to employees [with] in ... [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.”⁸

Once the above four elements have been proven—meaning the “prima facie case” has been established—a violation of the EPA has been demonstrated, and the employer must assert and prove at least one of the following four affirmative defenses to avoid liability, the last of which is a catch-all exception with significant breadth: employers may pay opposite sex employees differently where “such payment is made pursuant to” (1) “a seniority system,” (2) “a merit system,” (3) “a system which measures earnings by quantity or quality of production,” or (4) “a differential based on any other factor other than sex.”⁹ This last exception—often referred to as the “factor other than sex” exception—is where the salary history dilemma looms.

Factors Other Than Sex

One of the biggest debates among courts today involves whether this exception means what it says: will courts really accept *any* factor other than sex? There is a stark split on this point in the federal Courts of Appeals, which means that the jurisdiction within which a case is filed may affect the outcome. This observation has been statistically demonstrated. In jurisdictions where any bona fide *gender-neutral* factor other than sex is acceptable to justify a pay disparity between male and female employees, such as the Seventh and Eighth Circuits, success on appeal for employee plaintiffs is about 24 and 39 percent, respectively.¹⁰ Courts that require employers asserting the factor other than sex defense to articulate a factor that is also an *acceptable business reason* tend to be friendlier to plaintiffs. For example, plaintiffs in the Second Circuit, which covers the New York area, enjoy a 67 percent win-rate on appeal.¹¹

Since the initial days of the EPA, employers have been advancing market-based arguments as a factor other than sex to avoid liability. These “market factor” or “market force” claims come in a few different forms. In general, “market factor” arguments attempt to “justify ... wage disparity upon the ‘going market rate’ for employees of a certain gender.”¹² More specifically, it is a “theory based on the belief that labor market supply and demand dictates that women may be paid less than men.”¹³ Before 1974, it was significantly easier for an employer to use the market in this manner as an excuse to justify a sex-based pay disparity. In *Corning Glass Works*, the employer argued that the higher pay for male night shift workers “arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work.”¹⁴ The Supreme Court openly acknowledged that while “tak[ing] advantage of such a situation may be understandable as a matter of economics,...[the company’s wage] differential nevertheless became illegal once Congress enacted into law the principal of equal pay for equal work.”¹⁵ After *Corning Glass Works*, it is clear that the “argument that supply and demand dictates that women qua women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected.”¹⁶

Following *Corning Glass Works*, employers needed a new way to leverage market forces to their advantage. Employer-adopted policies to hire employees based on their previous salary emerged as a viable option. Such policies essentially flipped the traditional market force argument on its head; that is, instead of relying on external market conditions and openly claiming that the market priced women’s work at a wage rate lesser than men’s, employers began using a gender-neutral approach based on an internal policy that could be more easily defended as a factor other than sex.

A policy designed to base new applicants’ job offers on salary history is gender-neutral on its face because it applies uniformly regardless of gender. Assume a woman making an above-market-rate salary—even greater than that of men performing the same work—applies for a position with an employer utilizing a prior

salary policy. Also assume that, under the employer's prior salary policy, each new applicant who receives an offer of employment will receive a salary offer that is five percent greater than his or her previous salary. Under this policy, the employer will consider the applicant's prior salary in making the offer, and she will receive a job offer with a five percent increase on her previous salary. This is so even if the market overall for women in this position has been set at an amount less than that paid to men. The policy applies to the individual; it is not directly based on the external market. So long as the market has set the wage for women—or anyone else, for that matter—artificially low, the employer will reap most of the benefits he would have had under a traditional market force argument under the veil of a gender-neutral prior salary policy. What appears on its face to be an adaptable rule designed to factor in each person's previous salary ends up perpetuating existing market conditions, which is precisely what the traditional market force theory would have done as well. The Seventh Circuit explained it best: "The concern ... is that, although the policy of considering an employee's prior salary in setting his or her current wage is not objectionable in itself, this policy may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a previous employer."¹⁷

Courts quickly realized that relying on salary history, especially as a standalone factor other than sex, could be problematic. In 1982, the Ninth Circuit directly addressed the prior salary issue. *Kouba* involved a class of female Allstate Insurance agents who believed Allstate's policy of relying on salary history in hiring new sales agents was responsible for female agents making less than their male co-workers. Allstate asserted that its prior salary policy was a factor other than sex. The Ninth Circuit held that an employer "cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason."¹⁸ Furthermore, the Court explained that although "the Equal Pay Act does not impose a strict prohibition against the use of prior salary," "a factor like prior salary ... can easily be used to capitalize on the unfairly low salaries historically paid to women."¹⁹

Disagreeing with the Ninth Circuit in *Kouba*, the Seventh Circuit decided *Covington* in 1987. In *Covington*, the plaintiff, Patricia *Covington*, sued Southern Illinois University because it paid her a starting salary of \$800 per month when her male predecessor was paid a starting salary in the same position of \$1,080 per month. The pay discrepancy arose because the University had a policy of retaining the salary of employees who transferred to different jobs within the University. The court held that the University's salary retention policy was a valid factor other than sex because it differentiated between an employer considering "prior wages that it paid an employee, [from] the wages paid by a previous employer."²⁰ The chances of perpetuating discrimination are lesser in the former and greater in the latter. The court reasoned that because discrimination by a former employer is difficult to detect, it is more likely that a prior salary policy would perpetuate

discrimination in that situation. This is why, according to the *Covington* court, *Kouba* "held that prior salary could be a factor other than sex only if its use was business-related and it was actually taken into account in line with the employer's stated purpose."²¹ One way to ensure that past discrimination does not butterfly into other workplaces is by requiring an employer using a prior salary policy to justify its use with a business-related purpose.

Between *Kouba* and *Covington*, it became abundantly clear that a split was emerging: some courts were clearly more concerned about perpetuating historical gender discrimination than others. The Eleventh Circuit's decision in *Glenn v. General Motors Corp.* accentuated the split. In a scathing criticism of *Covington*, the *Glenn* court accused the Seventh Circuit of implicitly using the discredited market force theory and ignoring the purpose of the EPA by allowing the University to rely on its salary retention policy. According to the Eleventh Circuit, "prior salary alone cannot justify pay disparity."²² In a subsequent case penned soon after *Glenn*, the Eleventh Circuit explained that "to accept the... argument that prior salary alone is a per se factor other than sex would require this court to contravene Congress' intent and perpetuate the traditionally unequal salaries paid to women for equal work."²³ In an equally forceful response to the Eleventh Circuit's criticism, and reaffirmation of its position, the Seventh Circuit explained that "[i]t remains possible that pay differences between men and women reflect discrimination rather than choices made about allocating time between family and market endeavors, and some industries may have been successful in disguising their discrimination. But if this is so it must be established by evidence rather than assumed."²⁴

The Dilemma

Herein lays the dilemma, which has led to the recent attempts to prohibit employers from using salary history during the application process. The question is whether one believes that the market discriminates against women. If one believes that women are categorically paid a historically discriminatory low wage, then any prior salary policy will perpetuate discrimination, and employers should not be able to rely on such policies alone in a factor other than sex defense. If the employer wishes to use a prior salary policy, it must do so in conjunction with other acceptable business reasons. Courts that agree with the Eleventh Circuit generally hold this view.

If one believes women are paid less for some other non-sex-based reason, then one must determine where his or her priorities lie. From one perspective, competitive markets are impersonal, and perhaps the government should not interfere with an employer's desire to use a prior salary policy. In this way, each situation should be examined on a case-by-case basis, and discrimination must be affirmatively proven before an employer will be held liable for using a prior salary policy. Courts siding with the Seventh Circuit would generally agree with this perspective.

On the other hand, perhaps there is a third option. Employers can easily bypass courts that hold either of the above-mentioned two views by including other reasons in addition to the prior salary policy to justify a pay disparity as a factor other than sex—even if the salary policy is the primary reason for the disparity. In this way, prior salary policies are either harmless or a disguised version of the disfavored market force theory, but it is difficult, if not impossible, to tell one from the other. The third option recognizes that the risk of perpetuating discrimination is too great, and it seeks to address the prior salary issue at the outset: instead of prohibiting sole reliance on salary history or engaging in a case-by-case analysis at the risk of permitting past discrimination to perpetuate, city governments, state governments, and legislatures can decide to prohibit employers from seeking salary history altogether through legislation and executive orders.

PART II: SALARY HISTORY LAWS

As of the time of this Article, California, Massachusetts, New York State, New York City, New Orleans, Philadelphia, Pittsburgh, and Puerto Rico²⁵ have enacted some kind of salary history law. New York State, New York City, New Orleans, and Pittsburgh have instituted salary history bans in the public sector, mostly through executive orders. California, Massachusetts, New York City, and Philadelphia passed salary history laws that extend to the private sector. The Pay Equity for All Act of 2016, which would have amended the Fair Labor Standards Act to prohibit employers from asking prospective employees about their salary history, was introduced at the federal level in Congress last year and died in committee. Along similar lines, on April 4, 2017, Rep. DeLauro and Sen. Murray reintroduced the Paycheck Fairness Act, which would, among other things, prohibit employers seeking or relying on a prospective employee's wage history, unless a named exception applies. Lastly, it is worth noting that numerous other jurisdictions have introduced similar proposals which have yet to be adopted. Until recently, New York City was one such example. Its prior salary law—passed by the City Council on April 5, 2017—will be compared to those states and cities that have adopted a similar law.

New York City

New York City's proposed salary history ban adds a new subdivision to the New York City Human Rights Law, which is Title 8 of the Administrative Code. At the outset, it is important to note that there are two versions of Public Advocate James' salary history law. Int. 1253 is the initial, shorter version. After receiving public feedback at the December 2016 hearing, the Council made changes and proposed Int. 1253-A, which is the version that ultimately passed by a nearly unanimous 47-3 vote.

Int. 1253-A did not make many changes in terms of structure. Both Int. 1253 and 1253-A can be divided into two substantive parts: inquiry and reliance. Specifically, employers cannot "inquire about the salary history of an applicant for employment." If the employer somehow discovers an applicant's salary, the employer cannot "rely

on the salary history of an applicant in determining salary, benefits or other compensation ... during the hiring process, including the negotiation of a contract."²⁶

Notably, the definitional portions of 1253-A are more clearly delineated. The revised version expanded the definition of "to inquire" and defined "salary history." In general, any question, statement, or search of public records or reports aimed at obtaining an applicant's salary history will constitute an unlawful inquiry, unless an exception applies. Salary history "includes the applicant's current or prior wage, benefits or other compensation," but as explained below, "objective measure[s]" do not fall under the definition, which means employers may ask about them.

At the outset, note the gaping hole in the original legislation: the wording permitted a prospective employer to contact an applicant's prior employer and ask about his or her prior salary. The prohibition on inquiries applied to searches of publically available records or reports and direct questions to applicants; there was nothing in the proposed legislation prohibiting a prospective employer from contacting a previous employer. In practice, however, it is unlikely that a former employer will provide prior salary information to the applicant's prospective employer; it is often company policy to only provide a job title and dates of employment when asked to provide a reference.²⁷ Even so, the enacted version addresses this loophole by redefining the phrase "to inquire" to cover questions "to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer."²⁸

During the December 13, 2016, hearing before the Committee on Civil Rights, the New York Staffing Association (NYSA) submitted interesting testimony requesting that the proposed, original law be modified so as to allow staffing firms to verify "commissions and other incentive-based compensation, after a conditional offer is made...to ensure that candidates are right for the job."²⁹ The NYSA believed that it would be unable to evaluate candidates who received performance-based compensation because any inquiry about the candidate's performance will necessarily lead to salary history information.

Based on the legislation's original wording, the NYSA would have probably been able to glean more than enough information from an applicant to evaluate his or her abilities without running afoul of the law. First, it is possible for the NYSA's staffing firms to ask applicants who work in commission-based industries about the general structure of their incentive system and the amount the applicant sold without gaining any information about the applicant's prior salary. Second, it is unclear why the NYSA believed that verification of the candidate's salary information was forbidden. If the applicant indicates that he was responsible for bringing in a certain amount in sales for which he received a commission, there was nothing in the original version of the bill prohibiting the prospective employer from verifying that number with the

applicant's previous employer, as mentioned above. Furthermore, so long as the prospective employer does not ask for the exact commission formula, which would enable him to determine the applicant's prior salary, questions about the amount of sales generated by the applicant would have likely been acceptable.

Nonetheless, the Council addressed these concerns in 1253-A. It first excluded from the definition of "salary history" "any objective measure of the applicant's productivity such as revenue, sales, or other production reports." It then expanded upon the exception that allowed employers to rely on salary history where the applicant volunteered this information; under 1253-A, where the applicant volunteers his or her prior salary the employer may "verify" and "consider" it in making a salary offer. Finally, the Council specifically excepted from the new subdivision "[a]ny attempt by an employer ... to verify an applicant's disclosure of non-salary related information or conduct a background check" ³⁰

To quiet business groups afraid of losing the ability to negotiate with their applicants, the Council included two changes in 1253-A. ³¹ First, employers are expressly allowed, "without inquiring about salary history, [to] engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation" Second, the enacted law does not apply to applicants for "internal transfer or promotion with their current employer."

California

Unlike the other jurisdictions that passed prior salary laws, California's law does not ban inquiries. The original version of the proposed law would have banned inquiries, but it was vetoed by Governor Brown. The law that the Governor signed amends the California Labor Code by adding the following phrase in the state equal pay law: "Prior salary shall not, by itself, justify any disparity in compensation." ³² Therefore, for the purpose of state law, an employer's prior salary policy will not constitute a factor other than sex on its own. To escape liability, an employer relying on the factor other than sex defense will be required to demonstrate that there is a bona fide factor other than sex, such as education, training, or experience, which is business-related. ³³

Overall, the New York City proposal affords more protections than the California prior salary law. If the problem with employers asking for an applicant's prior salary involves the fear of perpetuating past discrimination, then prohibiting inquiries outright will provide the most direct solution. Permitting employers to make such inquiries and avoid liability by scrounging together other business-related reasons to justify a gender-based pay disparity leaves ample opportunity for discriminatory practices to fall through the cracks.

Massachusetts

On Monday, August 1, 2016, Massachusetts became the first state to prohibit employers from asking about applicant's prior salaries before offering them a job. The Massachusetts salary history law

takes effect on July 1, 2018. Under the new law, it is unlawful for an employer to "seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or to require that a prospective employee's prior wage or salary history meet certain criteria." ³⁴ If the employee voluntarily offers this information, the employer is permitted to confirm the wage or salary mentioned by the prospective employee. Moreover, once an offer of employment, with compensation terms, has been made, the employer is free to "seek or confirm a prospective employee's wage or salary history." ³⁵ Retaliation against employees who exercise their rights is also prohibited.

In my opinion, the Massachusetts law provides more clarity for employers than the original New York City 1253 proposal. The Massachusetts law clearly prohibits employers from seeking a prospective employee's salary history from both the prospective employee and his or her current or former employer. Int. 1253 prohibited inquiries to *applicants*, but there appeared to be no restriction on a prospective employer asking an applicant's former employer for the applicant's salary information.

Overall, the Massachusetts law and 1253-A are similar. They both provide helpful tiers of situations: for example, if the applicant volunteers his or her salary information, the prospective employer is free to confirm those prior wages under both laws. But there are differences worth noting. First, under the Massachusetts law, once an offer of employment with compensation terms has been extended, the employer is allowed to seek salary history information. Under 1253-A, the prospective employee would still arguably be an applicant until the offer is accepted, and so long as that is the case, the employer would not be allowed to inquire about his or her salary history. Second, the Massachusetts law bars seeking salary history from the prospective employee or the *current or former employer*, but it does not appear to address a situation where the employer finds this information through other avenues. In this way, 1253-A is more protective of employees because it prohibits both public records searches and reliance on salary history obtained by means other than voluntary disclosure.

Between the two, New York City did a better job creating a balanced compromise by drafting a clear and specific law that addresses the concerns of the business community while also targeting the specific employment practice at issue: prior salary policies that create the risk of perpetuating discrimination.

Philadelphia

On January 23, 2016, Philadelphia became the first city to ban employers from requesting salary history information. The law will take effect on May 23, 2017. Similar to the New York City law, the Philadelphia prior salary law is divided into a prohibition on inquiries and reliance on wage history, unless that wage history was voluntarily disclosed by the applicant. The Philadelphia law explicitly prohibits employers from requiring "disclosure or condition[ing] employment or consideration for an interview or employment on disclosure of wage history." ³⁶ Similar to

Massachusetts, there is also a retaliation provision that protects those prospective employees who fail to reply to forbidden prior salary-related inquiries.

Philadelphia's salary history law and 1253-A share similar language and structure. On balance, New York City's law appears to be more specific. For example, 1253-A does not apply to internal transfers or promotions, and the drafters went out of their way to explain that discussion concerning salary "expectations" is permissible, create an exception for objective measures of productivity, permit verification of non-salary related information, and allow background checks.

The most interesting aspect of the salary history fight in Philadelphia is the First Amendment challenge promised by Comcast, the telecommunications behemoth, and delivered by the local Chamber of Commerce. In a head-turning argument, Comcast and business groups in the area asserted that employers have a First Amendment right to ask about an applicant's wage history. If a court agrees that salary history laws' wage-gap-fighting purpose comes second to an employers' First Amendment right to ask about an applicant's salary history, a large swath of similar anti-discrimination laws that prohibit the asking of certain kinds of questions may be on the chopping block as well. So far, the Chamber has filed a federal lawsuit against Philadelphia, challenging the constitutionality of the law under the First Amendment and seeking a preliminary injunction that will bar enforcement of the new law.³⁷

PART III: COMMON ARGUMENTS

Because salary history laws are primarily targeting gender-based pay disparities, most arguments for and against these laws often rely on wage gap statistics. Based on recent statistics from the U.S. Census Bureau, the "2015 female-to-male earnings ratio was 0.80, not statistically different from 2014. The female-to-male earnings ratio has not experienced a statistically significant annual increase since 2007."³⁸ Looking at women's earnings as a percentage of men's and women's median usual weekly earnings by occupation, it is clear that, although the wage gap varies by industry, men consistently out-earn their female counterparts every time. According to the Department of Labor, female usual weekly earnings were 83 percent of men's.³⁹ Yet there are skeptics who claim that the wage gap statistics are overstated, and they leverage this skepticism to advocate against implementing new measures aimed at decreasing the wage gap, including prior salary laws.

"Personal Choices," Not Discrimination

One of the most common arguments against the wage gap is the "personal choice" claim, which maintains that women and men make different lifestyle choices that have real-world ramifications resulting in men making more than women. The Seventh Circuit has spoken favorably of this perspective.⁴⁰ The problem with this argument is that it starts to sound as if its proponents believe that women simply prefer less remunerative careers than men, which is a perspective that has not been broadly espoused for decades. In 1986, armed with statistical evidence, the EEOC alleged that

Sears was engaging in a pattern of sex discrimination by consigning women to low-paying noncommission jobs while reserving lucrative commission based jobs for men. Interpreting the EEOC's statistics as "virtually meaningless," the judge claimed women "expressed a preference for noncommission selling because it was more enjoyable and friendly," without the "increased pressure" of "dog-eat-dog competition."⁴¹ It is difficult to find modern cases that so openly stereotype women.

Ultimately, if wage gaps exist "at every educational level and in nearly every line of work," clearly the existence of a gender-based pay disparity cannot be refuted.⁴² But this does not mean that there is absolutely no merit to the "personal choice" argument: "after accounting for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status, [the American Association of University Women] found a remaining 7 percent difference between the earnings of male and female college graduates one year after graduation."⁴³ This seven percent wage gap that remains after all other relevant factors have been taken into account is generally considered the effect of sex discrimination; it is viewed as a disparity that can be reduced to no other explanation. Opponents of equal pay laws often argue that a seven percent gap is too little to justify additional restrictions on businesses. On the contrary, the better question might be whether society can, with good conscience, write off any discrimination as so minor that it does not even warrant removing one question from job applications.

Inappropriate Intervention

Another common objection to prior salary laws—and equal pay laws in general—is the "inappropriate intervention" argument, which maintains that employers are already bogged down with enough regulations such that implementing one more will be the proverbial straw that breaks the camel's back. A version of this argument was made by the employer-friendly group Partnership for New York City when its representative testified against the New York City prior salary law on December 13, 2016.

The weakness in this objection lies with its lack of substance. It is often accompanied by furious verbal hand-waving that distracts the onlooker from more focused arguments. Justifiably, businesses do not enjoy adapting to additional regulations. From one perspective, businesses are a crucial part of local economies; the more difficult it is for businesses to operate in a given area, the fewer companies there will be serving the region and employing the public. Those businesses will simply choose to operate in a less-burdensome environment.

On the other hand, regulation is part of doing business. Of course, it would be convenient if all jurisdictions had a streamlined legal and regulatory scheme with minimal governmental interventions. But expecting profit-oriented companies to always keep their employees' best interests at heart absent government intervention is as questionable as leaving a fox to guard the henhouse. The fox

may not eat the hens, but it is better to be safe and purchase a fence. In same way, employers may not be perpetuating a history of sex discrimination by maintaining a prior salary policy, but since there is at least a seven percent pay gap that cannot be explained by factors other than discrimination, it is worth removing one question from employers' interview repertoire.

Why Not Hire Only Women?

One deceptive objection typically progresses as follows: “if it were really true that an employer could get away with paying Jill less than Jack for the same work, clever entrepreneurs would fire all their male employees, replace them with females, and enjoy a huge market advantage.”⁴⁴ Those “clever” entrepreneurs would likely find themselves in court defending against both Title VII and EPA claims.

First, this is sex discrimination—firing men because they are men. Assume an employer that operates a grocery store walks in one morning and tells all the men that they have been replaced by women willing to work for less money. Under Title VII, it is an “unlawful employment practice” for an employer to “discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s...sex.”⁴⁵ The only way the employer could maintain a single-gender, female workforce would be by arguing that being a woman is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁴⁶ Meeting this high BFOQ standard as a grocery store—and many other businesses—will likely be impossible.

Second, assume the employer actually hires women to work for less money than what was paid to the men doing the same job. These women would have an EPA case. They would point to their opposite sex predecessors that were making more money and argue unequal pay for equal work. The employer would then be forced to assert an affirmative defense to avoid liability, but that will be difficult considering the openly discriminatory circumstances.

CONCLUSION

Equal pay laws have come a long way since the EPA was enacted in 1963. But unaddressed loopholes still remain. The ability to rely on prior salary policies through the factor other than sex defense in federal EPA cases is one such example. The fear is that permitting the use of prior salary policies perpetuates past discrimination. Because it is difficult to affirmatively prove that such perpetuation is taking place, cities and states have taken it upon themselves to proactively prohibit employers from asking about and considering an applicant's prior salary in making employment decisions. Numerous jurisdictions have enacted bans on prior salary-related inquiries through executive orders from a mayor or governor; these bans are only applicable to the public sector. One state, one U.S. territory, and two cities have managed to pass such bans in the private sector, and more are attempting to follow in their footsteps. “Being underpaid once should not condemn one to a lifetime of

inequity We will never close the wage gap unless we continue to enact proactive policies that promote economic justice and equity.”⁴⁷ The goal of salary history laws is to prevent the wages set by discriminatory former employers from butterflying into other workplaces. New York City's 1253-A is a well-drafted attempt to address this specific issue. By focusing its restrictions on inquiries into and reliance on salary history during the hiring process—while excluding applicants for internal transfer or promotion from coverage—the new law targets a practice that perpetuates discrimination when applicants move from one workplace to another. Although keeping employers in the dark on salary history is unfair in the eyes of the business community, salary history bans that prohibit employers from asking applicants about their prior wages are easily defensible as a way to maximize the chance an employer will make an objective offer based on the applicant as opposed to leveraging the applicant's salary history, which can potentially perpetuate a discriminatorily set prior wage.

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NOTES:

- ¹ NYC Council Int. 1253-2016.
- ² The Public Advocate for the City of New York. “Policy Report: Advancing Pay Equity in New York City” (April 2016). Retrieved March 3, 2017. http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/opa_pay_equity_report_final.pdf.
- ³ *Id.*
- ⁴ NYC Exec. Order No. 21 (Nov. 4, 2016).
- ⁵ NY Exec. Order No. 161 (Jan. 9, 2017).
- ⁶ *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).
- ⁷ 29 U.S.C. § 206(d)(1) (2012).
- ⁸ § 206(d)(1).
- ⁹ § 206(d)(1).
- ¹⁰ Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 27-37 (2010).
- ¹¹ *Id.*
- ¹² *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 507 (10th Cir. 2003).
- ¹³ *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003).
- ¹⁴ *Corning Glass Works*, 417 U.S. at 205.
- ¹⁵ *Id.*
- ¹⁶ *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) (quoting *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037 (11th Cir. 1985)).
- ¹⁷ *Covington v. Southern Illinois University*, 816 F.2d 317, 322 (7th Cir. 1987).

¹⁸Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982).

¹⁹Kouba, 691 F.2d at 876, 78.

²⁰Covington, 816 F.2d at 322-23.

²¹Id. at 323.

²²Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988).

²³Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988).

²⁴Wernsing v. Dept. of Human Servs., 427 F.3d 466, 471 (7th Cir. 2005).

²⁵Puerto Rico's Act 16-2017 will not be addressed in this Article due to space limitations.

²⁶NYC Council Int. 1253-A.

²⁷New York State Dept. of Labor. "What are My Rights When I Apply for a Job? Fact Sheet." Retrieved Mar. 16, 2017. <https://labor.ny.gov/formsdocs/factsheets/pdfs/P117.pdf>.

²⁸NYC Council Int. 1253-A.

²⁹NYC Council. Hearing on Int. 1253-2016 before Committee on Civil Rights. "Hearing Testimony 12/13/16." Retrieved Mar. 19, 2017. <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=ID|Text|&Search=1253>

³⁰NYC Council Int. 1253-A.

³¹Ian-Paul A. Poulos, "Bill on Salary History Protects Applicants' Negotiating Leverage," Crain's New York Business (Dec. 29, 2016).

³²Cal. Labor Code § 1197.5(3).

³³See *id.*

³⁴Mass. Gen. Laws ch. 149, § 105A(c)(2) (Effective July 1, 2018).

³⁵Id.

³⁶City of Philadelphia Bill No. 160840.

³⁷"Chamber of Commerce Suing Philadelphia Over 'Wage History' Legislation," *Biz Journals* (April 6, 2017).

³⁸Proctor, B.D., Semega, J. L., & Kollar, M.A. (2016). U.S. Census Bureau, Current Population Reports. "Income and Poverty in the United States: 2015." Retrieved March 23, 2017. <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf>.

³⁹U.S. Dept. of Labor. "Women's Earnings 83 Percent of Men's, But Vary by Occupation." Retrieved Mar. 23, 2017. <https://www.bls.gov/opub/ted/2016/womens-earnings-83-percent-of-mens-but-vary-by-occupation.htm>.

⁴⁰See *supra* note 24 & accompanying text.

⁴¹EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (1986).

⁴²American Association of University Women (Spring 2017). "The Simple Truth about the Gender Pay Gap." Retrieved Mar. 23, 2017. http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth.


⁴³Id.

⁴⁴Christina Hoff Sommers, "Wage Gap Myth Exposed—By Feminists," *Huffington Post* (Jan. 23, 2014).

²⁵⁴²U.S.C. § 2000e-2(a)(1).

²⁵⁴²U.S.C. § 2000e-2(e).

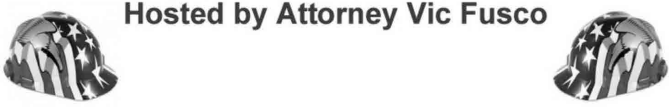
²⁵Office of Public Advocate for the City of New York. "Re: Salary History Law." Message to Ian-Paul A. Poulos. April 14, 2017. E-mail.



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