



### EDITOR'S INTRODUCTION

This year-end edition of Quick Prophets offers a preview of a bill that was signed by Gov. Brown in October that is intended to improve equality in pay for employees in California, especially for women, while prohibiting employers from using a person's past salary history as a factor in the decision to hire. AB 168, which becomes part of the California Labor Code on New Year's Day, will add California to a group of states and cities that are ensuring, among other things, that an employer, if asked, must provide a candidate with the pay scale for a new job. ▣

# MUM'S THE WORD FOR EMPLOYEE SALARIES IN CALIFORNIA

By TRICIA L. LEGITTINO and CHANEL L. OLDHAM

On January 1, 2018, California will join the ever-growing list of states and cities (Delaware, Massachusetts, New York, Puerto Rico, and Oregon; New York City, Philadelphia, and San Francisco) that statutorily ban all employers from inquiring about a job candidate's salary history and from using a potential candidate's salary history to determine whether to extend an offer of employment and at what pay level.

Specifically, AB 168, signed by Governor Brown on October 12, 2017, adds Section 432.3 to the California Labor Code, which, in addition to prohibiting employers from using candidates' salary histories in making employment decisions, prohibits employers from seeking candidates' salary histories and requires that employers

provide candidates with a pay scale for the position, upon request.

While AB 168 does not define "pay scale," both it and California Labor Code Section 432.3 define "salary" to refer to all forms of compensation, including but not limited to monetary payment and benefits.

Thus, AB 168 prohibits employers from inquiring about a candidate's history of all forms of monetary compensation and benefits (e.g., stock option plans, retirement plans, health benefits, child care costs, etc.).

### Closing the pay gap

AB 168 is part of a wider effort to mitigate and combat gender pay inequality (according to federal data, women in California are paid 86 cents for every dollar their male counter-parts earn). While the

new legislation does not directly discuss or reference pay equality, the legislative commentary demonstrates that pay equality was a major factor in drafting this legislation. "Gender wage discrimination is destructive not only for female workers but for our entire economy. Closing the wage gap starts with barring employers from asking questions about salary history so that previous salary discrimination is not perpetuated."

The idea behind this and similar laws is that pay inequality can beleaguer people for the duration of their work life. If workers experience pay discrimination early in their careers, disclosing past salary details will most likely put them at a disadvantage when negotiating subsequent compensation packages.

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# Employee salaries and confidentiality

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In other words, once a disparity in compensation is introduced, it can reduce a person's potential earning power across an entire career. For this same reason, earlier this year Gov. Brown vetoed a bill which would have required employers to publicly reveal the pay difference between their male and female employees who hold the same or similar positions.

## Voluntary disclosure

Practically speaking, while AB 168 prevents an employer from inquiring about a potential employee's compensation history (either directly or through the use of an agent), an employer may consider a candidate's salary history if the candidate voluntarily (and without prompting) discloses that information to the employer or its agent.

However, even if a salary history is voluntarily disclosed, the employer is still prohibited from using that information in determining whether to hire the candidate, but may use that information in connection with determining the candidate's salary.

Another exception exists for salary history information that is disclosable to the public pursuant to federal or state disclosure laws such

as the California Public Records Act and the federal Freedom of Information Act.

## 'Don't ask – don't tell'

While employers believe this version of a "don't ask – don't tell" law will have a chilling effect on the hiring process and may even be detrimental to job applicants, there are a few measures companies can start taking now in order to be ready when this law takes effect on Jan. 1.

First, companies must make sure that anyone associated with the organization that is involved in making hiring decisions, or in the interviewing process, is aware of and trained in the prohibitions set out in AB 168. This includes not only in-house employees performing these functions, but also any headhunters or other firms that may be providing job applicants to the company.

Second, companies should start revising any form job applications or questionnaires, removing all references or requests for a candidate's compensation history.

Finally, companies should take this as an opportunity to update their interview practices or standard questions to eliminate questions that target (directly or indirectly) learning about a candidate's compensation history. ■



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