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THE NEW JERSEY BAN ON SALARY
HISTORY QUESTIONS: CLOSING THE
GENDER WAGE GAP ONE QUESTION AT A
TIME

Abigail Cook*

* *Special thanks to Professor Sally Goldfarb for her tireless edits and encouragement.*

I. Introduction

Kerri Sleeman's supervisor told her many times: "if [he] could duplicate [her], [he'd] be able to get rid of the rest of the staff." Sleeman thrived as the supervisor who took over a failing project and turned it around. Yet, when the company proceeded through bankruptcy court, Sleeman discovered that many of the young men she supervised were getting paid more than her. When she spoke up about the discrepancy, her former supervisor unapologetically suggested that the men probably made more because they were the sole breadwinners for their wives and families.¹ Sleeman lost out of more than \$10,000 in pay and retirement benefits in the short five years she worked for that company.² Unfortunately, Kerri Sleeman's situation is not unique; almost all working women are impacted by the gender wage gap.³

A. The Gender Wage Gap

In 2017, women nationally earned only 80 percent of what men earned, creating an annual wage gap of more than \$10,000 for full-time workers.⁴ In the 1980s the gap was

¹ Elizabeth Owens, *Bankruptcy Court Revealed "Heartbreaking" Pay Inequity*, AAUW (May 9, 2013), <https://www.aauw.org/2013/05/09/heartbreaking-pay-inequity/>.

² *Id.*

³ Alexandra N. Phillips, *Promulgating Parity: An Argument for a States-Based Approach to Valuing Women's Work and Ensuring Pay Equity in the United States*, 92 TUL. L. REV. 719, 721 (2018) (citing Elise Gould, Jessica Schieder & Kathleen Geier, Econ. Policy Inst., *What Is the Gender Pay Gap and Is It Real?* 5 (2016)).

⁴ *America's Women and the Wage Gap*, NATIONAL PARTNERSHIP (Sept. 2018), <http://www.nationalpartnership.org/research->

upwards of thirty-five cents on the dollar, but has narrowed to about an eighteen-cent difference.⁵ At eighty-two cents on the dollar in 2019, it would take women an extra forty-seven days of work to earn the equivalent of what a man made in a given year.⁶ According to recent census information, the American Association of University Women (AAUW) predicts that the gender pay gap is closing so slowly that women will not have equal pay until close to 2119.⁷ Women of color face an even greater pay disparity,⁸ with Black women making sixty-three cents, Native American women making fifty-seven cents, and Hispanic women making fifty-four cents on the white mans' dollar.⁹

library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf.

⁵ Nikki Graf, Anna Brown and Eileen Patten, *The narrowing, but persistent, gender gap in pay*, PEW RESEARCH CENTER (Apr. 9, 2018), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>.

⁶ *Id.*

⁷ Amy Becker, *Gender Pay Gap Remains at 20 Cents*, AAUW (Sept. 12, 2017), https://www.aauw.org/article/pay-gap-remains-at-20-cents/?gclid=EAIaIQobChMIg-yI6_yx3gIVQzoMChoVvgoVEAAYASAAEgIt7fD_BwE.

⁸ *The Simple Truth About the Gender Pay Gap*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, available at <https://www.aauw.org/files/2017/09/TheSimpleTruthFall2017OnePager-nsa.pdf> (last visited Nov. 5, 2018).

⁹ *See The Wage Gap Between White and Black Men is Growing Wider*, THE ECONOMIST (July 7, 2018), <https://www.economist.com/united-states/2018/07/07/the-wage-gap-between-white-and-black-men-is-growing-wider>. (This note does not purport to minimize discrimination against other classes but will be focused primarily on the impact of the gender wage gap and salary history questions on women. Further, any unqualified statistics used

Women in New Jersey do not fare much better. In 2016, men made 1.36 times more than women in the same jobs.¹⁰ This was consistent in each of the five most common jobs in New Jersey, with the average full-time man making over twenty thousand dollars more a year.¹¹ In just one year, a full-time working woman stands to be underpaid enough money to pay for nearly two years' worth of groceries, five months of mortgage and utility payments, or ten months of rent.¹² According to the Office of New Jersey Governor, Phil Murphy, in April of 2018;

“In New Jersey, the median salary for women working full-time is just over \$50,000, or \$11,737 less than the median annual salary for a man. Across all races, women working full-time, on average, earn 82 cents for every dollar earned by a male doing similar work. African-American women earn about 60 cents for every dollar earned by a white male while a Latina earns only 43 cents. Overall, the economic cost of this disparity totals an estimated \$32.5 billion a year in lost wages and economic power.”¹³

in this note are averages which do not represent the discrimination on women of color which is historically lower. Men of color and other minorities face similar wage gap. The barriers to pay equity for men of color are related to those faced by women of color but are also very unique as a result of the amount of black men of working age who are incarcerated.).

¹⁰ *Wage by Gender in Common Jobs*, DATA USA: NEW JERSEY, <https://datausa.io/profile/geo/new-jersey/#economy> (last visited Nov. 5, 2018).

¹¹ *Id.*

¹² *Id.*

¹³ *Governor Murphy Signs Historic, Sweeping Pay Legislation*, STATE OF NEW JERSEY GOVERNOR PHIL MURPHY'S OFFICE (APR. 24,

The breadth of the impact of pay inequality extends from each individual woman to the entire U.S. economy, and everything in between. The gender wage gap holds impoverished women in poverty and restricts many reaching financial security.¹⁴ Women who are not financially secure are less likely to be homeowners and more likely to have stress over loans.¹⁵ Families also suffer from the gender wage gap that puts more money in the pockets of men; “when women control household spending, the money goes toward more family-targeted goods.”¹⁶ For the eighty percent of black women who are the sole

2018),

https://nj.gov/governor/news/news/562018/approved/20180424a_equalpay.shtml; LWD’s reporting system for the Diane B. Allen Equal Pay Act, State of New Jersey Department of Labor and Workforce Development, <https://nj.gov/labor/equalpay/equalpay.html> (last visited Nov. 4, 2018); see *New Jersey Women and the Wage Gap*, NATL. P’SHP FOR WOMEN & FAMILIES (Apr. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2016-nj-wage-gap.pdf>.

¹⁴ Natelegé Whaley, *3 Long-Term Effects the Gender Pay Gap Has On Women*, INST. FOR WOMEN’S POLICY RESEARCH (Apr. 10, 2018), <https://iwpr.org/3-long-term-effects-gender-pay-gap-women/> (According to the Institute for Women’s Policy Research, “if women were paid the same as men, . . . the poverty rate among working women would decrease from 8.0% to 3.8%.).

¹⁵ *LendingTree Survey Finds Millennial Women More Fiscally Responsible, Less Financially Secure Compared to Millennial Men*, CISION PR NEWSWIRE, (Aug. 2, 2017) <https://www.prnewswire.com/news-releases/lendingtree-survey-finds-millennial-women-more-fiscally-responsible-less-financially-secure-compared-to-millennial-men-300498412.html>.

¹⁶ Derek Thompson, *Women Are More Responsible With Money Studies Show*, THE ATLANTIC (Jan. 31, 2011), <https://www.theatlantic.com/business/archive/2011/01/women-are-more-responsible-with-money-studies-show/70539/>.

or primary breadwinners for their families,¹⁷ a fair wage could mean being able to pay rent, or not having to choose between feeding your children and keeping the lights on.

Making less money continues to hurt women into retirement. With lower earnings, women's pensions may be considerably lower, contributing to a poverty rate for women over sixty-five-years-old in the United States that is nearly double that of their male counterparts.¹⁸ The gender wage gap even disadvantages the U.S. economy, to the amount of about \$4.3 trillion according to one study.¹⁹

B. Causes of the Gender Wage Gap

There are a lot of suggested reasons for the gender wage gap, some of which point to the way our society talks about salaries. Conversations about money are already taboo in American culture. Twenty-five percent of private companies in 2017 explicitly prohibited intra-office discussion of salary

¹⁷ *Black Women and the Pay Gap*, AAUW (Aug. 1, 2018), <https://www.aauw.org/article/black-women-and-the-pay-gap/>.

¹⁸ Susan Bisom-Rapp and Malcolm Sargeant, *It's Complicated: Age, Gender, and Lifetime Discrimination Against Working Women - The United States and the U.K. as Examples*, 22 ELDER L.J. 1, 2 (2014) (citing *Rights, Jobs and Social Security: New Visions for Older Women and Men*, INT'L LABOUR ORG. (Sept. 30, 2008), http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS_098840/lang--en/index.htm).

¹⁹ Kerri Anne Renzulli, *How Better Pay for Women Would Kickstart Amazing Economic Growth*, TIME.COM MONEY (Apr. 8, 2016), <http://time.com/money/4286527/women-equal-pay-economy/> (The study by McKinsey Global Institute predicted that if every state matched the top growth rate for women, the benefit would be the equivalent of adding an economy the size of Texas).

information and forty-one percent discouraged it.²⁰ This practice leaves women without tools to recognize or address the fact that they are being underpaid.

Women's general lack of negotiation skills and social barriers also contributes to the gender wage gap.²¹ Society in the United States is generally uncomfortable with women asking for money or asserting themselves in the public sphere.²² When women fail to negotiate effectively, the issue follows them for the rest of their careers. If women do not negotiate their starting salaries, a low salary may allow future employers to

²⁰ Jeff Hayes, *Private Sector Workers Lack Pay Transparency: Pay Secrecy May Reduce Women's Bargaining Power and Contribute to Gender Wage Gap*, INSTITUTION FOR WOMEN'S POLICY RESEARCH (Dec. 20, 2018), available at <https://iwpr.org/publications/private-sector-pay-secrecy/>.

²¹ See Julia Johnson, *Gender Differences in Negotiation: Implications for Salary Negotiations*, 23 UCLA WOMEN'S L.J. 131, 135 (citing Barry Gerhart and Sara Rynes, *Determinants and consequences of salary negotiations by male and female MBA graduates*, JOURNAL OF APPLIED PSYCHOLOGY, VOL 76(2), 256-62) (Recent studies are disputing the idea that women negotiate on less occasions than men, finding that they may actually negotiate the same amount; yet women still come out of negotiations with less than what they asked for and less than what their male counterparts are given); Christina Lopez, *How Salary Negotiation Contributes to the Wage Gap*, MONSTER, <https://www.monster.com/career-advice/article/salary-negotiation-gender-wage-gap> (last visited Nov. 11, 2018).

²² See generally Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, H. BUS. REV. (Sept. 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity>; Maria Konnikova, *Lean Out: The Dangers For Women Who Negotiate*, THE NEW YORKER (June 10, 2014), <https://www.newyorker.com/science/maria-konnikova/lean-out-the-dangers-for-women-who-negotiate>.

continue paying them poorly based on previous discriminatory wages.²³

C. Salary History Questions Impact on the Gender Wage Gap

Employers often ask job applicants for a current or previous salary. They use that information, potentially alongside other factors, to determine how much they will pay the applicant if hired. In previous jobs women likely made less money than their male counterparts for a few reasons. First, discrimination and stereotypes may cause women to be paid less and miss out on promotions for which they are qualified.²⁴ Second, men may be more inclined (and able) to take “career risks” that will benefit their salary in the long run.²⁵ Men may also be more likely to choose careers or specific jobs based on pay because they are more “single minded about acquiring resources than women.”²⁶ Third, women are more likely to take significant time off of work or reduce their work hours in order to care for children or other family members.²⁷ Their absence from the workforce can leave them with less experience

²³ SYMPOSIUM: Women, Unions, and Negotiation, 14 Nev. L.J. 465, 482.

²⁴ EQUAL WORK, 77 Md. L. Rev. 581, 591 (2018); Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky, and Martha Gever, *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 338 (1995).

²⁵ Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 980 (1995).

²⁶ *Id.*

²⁷ Kim Parker, *Women more than men adjust their careers for family life*, PEW RESEARCH CENTER (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>.

generally or force them to restart a career path from the bottom upon re-entering the labor force.

When women tend to make less money to start with, they are left in a cycle of low pay if each job change relying on their prior salary. This snowball effect is a driving force behind banning salary history questions.²⁸ When job applicants seek new opportunities, their previous employer's discriminatory pay practices should not determine their worth.

Since 2017, however, legislatures in over forty jurisdictions have taken the gender pay gap issue into their own hands.²⁹ Politicians across the country have "considered more than 100 bills intended to narrow the lingering pay gap between men and women" and "at least twenty-three states, from Hawaii to New Jersey, have introduced some type of pay equity measure thus far in 2018."³⁰ New Jersey is one of those states; in January of 2018 Governor Phil Murphy signed Executive Order #1: Promoting Equal Pay, Gender Equality ("EO1").³¹ This executive order prohibits state employers from inquiring into

²⁸ See MASS. ANN. LAWS ch. 149, § 105A(c)(1)-(2); MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL, AN ACT TO ESTABLISH PAY EQUITY: OVERVIEW AND FREQUENTLY ASKED QUESTIONS, 13 (Mar. 1, 2018), available at <https://www.mass.gov/files/documents/2018/05/02/AGO%20Equal%20Pay%20Act%20Guidance%20%285-2-18%29.pdf> [hereinafter *AG Guidance Letter*].

²⁹ Aaron Crews, *You're Gonna Need A Bigger Boat: Pay Equity Initiatives Flood the State Legislatures*, LITTLER INSIGHT (Feb. 14, 2018), <https://www.littler.com/publication-press/publication/youre-gonna-need-bigger-boat-pay-equity-initiatives-flood-state>.

³⁰ *Id.*

³¹ Executive Orders, THE OFFICIAL WEBSITE FOR THE STATE OF NEW JERSEY, <https://nj.gov/infobank/eo/056murphy/> last visited Nov. 4, 2018.

current or previous salaries,³² recognizing that using salary histories may perpetuate the gender wage gap.³³

D. The Impact of Salary History bans

“This research on the early effects of California’s [salary history ban] shows that this policy has the intended result of reducing pay inequities experienced by female employees.”³⁴

California, as a case study, shows that salary history bans can be an effective tool to address the gender wage gap. The results of the California salary history ban have already shown progress in closing California’s gender wage gap.³⁵ As of 2018, the average earnings ratio between men and women rose from 0.77 to 0.82, which is the first time that number has significantly moved in eleven years.³⁶ Research into California’s ban is important for two reasons beyond just acknowledging success in closing the gender wage gap. First, the change in

³² See N.J.A.C. Exec. Order No. 1 §1 (2018).

³³ See generally *Governor Murphy signs Executive Order Promoting Equal Pay*, GENDER EQUITY, STATE OF THE NEW JERSEY OFFICE OF THE GOVERNOR, https://nj.gov/governor/news/news/562018/approved/20180116a_eo.shtml (last visited Nov. 4, 2018).

³⁴ Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California’s Salary History Ban* 23, (Univ. Or., Working Paper), <https://ssrn.com/abstract=3277664> [hereinafter *Early Evidence From California’s Salary History Ban*].

³⁵ *Id.* at 4.

³⁶ *Id.* at 9-10 (This ratio increase is equivalent to a 10.4% decrease in the gender wage gap in California).

earnings was predominantly from male-dominated industries.³⁷ This suggests that perhaps women experience more gender pay discrimination in male dominated industries, but may also be influenced by the fact that women-dominated industries tend to pay less overall.³⁸ Second, the ban did not appear to cause any men or women to enter or exit the labor market.³⁹ The lack of disruption in the labor market suggests that the money is available to pay women what they deserve; women will not take other people's jobs or uproot the labor force if they are paid fair value for their work.

Although there are some twists to its success, initial research in Massachusetts suggests that “[men and women who refused to offer their salary] tended to earn more in their current jobs than the candidates who revealed their salary history.”⁴⁰ Not disclosing salaries will also ensure wages are based on job-relevant criteria like qualifications, responsibilities and market factors.⁴¹

Data on whether preventing employers from seeing salary histories has an impact on hiring and compensation practices is split. One experiment done by economists in 2017 suggests that it does.⁴² In that study, researchers randomly assigned a group

³⁷ *Id.* at 12.

³⁸ *Id.* at 2; see Motoko Rich, *Why Don't More Men Go Into Teaching?*, THE NEW YORK TIMES (Sept. 6, 2014), <https://www.nytimes.com/2014/09/07/sunday-review/why-dont-more-men-go-into-teaching.html>.

³⁹ *Id.* at 20-21.

⁴⁰ Frank, *supra* note 22.

⁴¹ State and Local Salary History Bans, Practical Law Practice Note w-005-9410.

⁴² *Employment Law -- Equal Pay Legislation -- Oregon Bans Employers from Asking Job Applicants About Prior Salary, Oregon*

of employers to be aware of job applicants' prior wages, while another group of employers was unaware.⁴³ The employers that were unaware of salary histories were more likely to call back and hire applicants who had lower salary histories.⁴⁴ Another survey done by a compensation data and software company, PayScale, found the opposite conclusion.⁴⁵ When Payscale questioned 15,413 job seekers, the company found that “a woman who was asked about her salary history and refused to disclose was actually offered 1.8% less than a woman who was asked and did disclose.”⁴⁶ Part of these results may be due to implicit bias of employers and their inability to separate a candidate's gender from what they bring to the position. Further, the social costs for women in negotiation situations are higher and there is a negative response when women ask for more money or equal pay.⁴⁷

Equal Pay Act of 2017, 2017 Or. Laws Ch. 197, H.B. 2005 (to Be Codified in Scattered Sections of OR. REV. STAT.); 131 HARV. L. REV. 1513, 1519 (2018) (citing Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence from a Field Experiment* (CESifo, Working Paper No. 6559, 2017), <https://ssrn.com/abstract=3014719> [<https://perma.cc/KT5E-ZA6D>]).

⁴³ *Id.* at 6, 10.

⁴⁴ *Id.* at 16, 21-22.

⁴⁵ Frank, *supra* note 22..

⁴⁶ *Id.*

⁴⁷ Hannah Bowles, *Why Women Don't Negotiate Their Job Offers*, HARV. BUSINESS REV. (June. 2014), available at <https://hbr.org/2014/06/why-women-dont-negotiate-their-job-offers>; see also “Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask.” NeuroImage, ACADEMIC PRESS, SCIENCE DIRECT, 7 (Nov. 2006),

Some employers have responded positively to this issue. Companies like Amazon and Bank of America have recently *voluntarily elected* not to ask for a prospective candidate's pay history, even though no legal restriction prohibits them from doing so.⁴⁸ Other companies like Google, Facebook and Wells Fargo stopped asking for salary histories after the state or locality where they were headquartered passed laws prohibiting it.⁴⁹ However, in a broader study, only five percent of employers responded that requesting salary history information was a part of their hiring practice, and about thirty percent said they were not prepared for the legislation to take effect.⁵⁰ Two-thirds of the one hundred and eight companies responded that they thought the measures “would not, or would only to a small extent, improve any pay differentials that exist,” because they believed there were already rigorous systems in place to monitor pay inequity and the actual gap is only in the single digits.⁵¹ This may be particularly relevant in industries, like entertainment, that rely heavily on “quotes” for jobs based on past performance.⁵²

available at

www.sciencedirect.com/science/article/pii/S0749597806000884.

⁴⁸ Madison Alder, *Amazon, BofA, Join Employers That Won't Ask for Pay History*, BLOOMBERG (Jan. 30, 2018), available at <https://www.bna.com/amazon-bofa-join-n73014474798/>.

⁴⁹ *Id.*

⁵⁰ Jenna McGregor, *Employers don't think bans on asking about salary history will achieve goal, survey says*, L.A. TIMES (Nov. 17, 2017), available at <http://www.latimes.com/business/la-fi-salary-history-workplace-law-20171116-story.html>.

⁵¹ *Id.*

⁵² See Nestor Barrero, Sayaka Karitani, and Jade Brewster, *Quote No More*, L.A. LAW. 22, 27 (May 2018), available at

Legislatures in over forty jurisdictions have taken action; considering more than 100 bills in twenty-three states.⁵³ This note will address some of the most prominent salary history bans enacted by other states before critiquing New Jersey's.

II. Comparative Legislation Regarding Salary History Question Bans

By the close of 2018, twelve states and cities had created different types of prohibitions on requesting salary information and five more are currently considering such legislation.⁵⁴ Massachusetts was the first state to pass an equal pay law that takes aim at the use of salary histories in hiring decisions.⁵⁵

A. Massachusetts: The First⁵⁶

In August of 2016, Massachusetts became the first state to address salary history questions with legislation.⁵⁷ Governor Charlie Baker signed The Act to Establish Pay Equity (“MEPA”),

<http://www.lacba.org/docs/default-source/lal-magazine/2018-test-articles/may2018testarticle.pdf>.

⁵³ *Id.*

⁵⁴ Alder, *supra* note 48.

⁵⁵ *Id.*

⁵⁶ See Joon Hwang, *Delaware Enacts Law to Address Gender Pay Gap By Prohibiting Employers From Requesting Compensation History of Job Applicants*, LITTLER (June 19, 2017), <https://www.littler.com/publication-press/publication/delaware-enacts-law-address-gender-pay-gap-prohibiting-employers> (The title of “First” here refers to Massachusetts being *the first state to pass legislation* for a salary history ban. Note that technically Delaware’s salary history ban was *the first to take effect*.).

⁵⁷ MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2016); see *Oregon Bans from Asking Job Applicants About Prior Salary*, *supra* note 96.

which amended the previous Pay Equity Law.⁵⁸ On July 1, 2018, the bipartisan act took effect, clarifying what constitutes unlawful wage discrimination and adding protections to ensure greater equity for

workers.⁵⁹ One of those protections is a state prohibition on employers asking job applicants for their salary histories, making Massachusetts the first state to enact such a ban.⁶⁰

MEPA applies expansively to all private and public employers, regardless of number of employees, as long their employees perform “all or a greater part of their work in Massachusetts.”⁶¹ The law prohibits employers from (1) seeking out the salary histories of job applicants from the applicants themselves, (2) requiring that job applicants meet specific salary history criterion, or (3) suggesting that applicants willingly volunteer their salary history.⁶² Salary information cannot be sought or provided by a recruiter, job placement service or any

⁵⁸ Mass. Gen. Laws Ann. ch. 149, § 105A (West); <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter177>.

⁵⁹*Id.*; William Piptman, Governor Baker Signs Bipartisan Pay Equity Legislation, MASS.GOV (August 1, 2016), <https://www.mass.gov/news/governor-baker-signs-bipartisan-pay-equity-legislation>; *AG Guidance Letter*, *supra* note 28.

⁶⁰ William Piptman, Governor Baker Signs Bipartisan Pay Equity Legislation, Mass.gov, <https://www.mass.gov/news/governor-baker-signs-bipartisan-pay-equity-legislation> (August 1st, 2016); MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2016).

⁶¹ Mass. Gen. Laws Ann. ch. 149, § 105A (West) (However, MEPA does not cover the Federal Government as an employer); Renee Inomata, *Massachusetts Pay Equity Law Bans Salary History Inquiry, and So Much More*, THE IN-HOUSE ADVISOR (Apr. 19, 2018), <http://www.in-houseadvisor.com/2018/04/19/massachusetts-pay-equity-law-bans-salary-history-inquiry-and-so-much-more/>.

⁶² *AG Guidance Letter*, *supra* note 28.

agent of the employer.⁶³ Employers are not technically prohibited from locating salary history information from public sources, but the Massachusetts' Attorney General's Office emphasizes that regardless of the source of the information, employers using salary history as a justification to set a non-competitive salaries are at risk of violating MEPA.⁶⁴

Employers in Massachusetts *are* allowed to ask applicants about their expected salaries.⁶⁵ This practice may be tricky, however, as employers are prohibited from asking follow up questions which may reveal salary history information, such as what the basis was for the prospective employee's expected salary determination.⁶⁶

There are two exceptions identified in MEPA where Massachusetts employers are allowed to inquire about salary history. The first situation is to confirm information that an applicant has "voluntarily disclosed" to the employer.⁶⁷ In a guidance document, the Office of the Attorney General elaborated that information will qualify as "voluntarily disclosed" if "a reasonable person in the prospective employee's position would not think, based on the employer's words or actions, that the employer suggested or encouraged the

⁶³ *Id.*

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 13-14.

⁶⁶ Annie Pilon, Interview Questions You May and May Not Ask Under New Massachusetts Pay Equity Law, SMALL BUSINESS TRENDS (June 25, 2018), <https://smallbiztrends.com/2018/06/massachusetts-pay-equity-law.html>; *AG Guidance Letter*, *supra* note 28.

⁶⁷ Mass. Gen. Laws Ann. ch. 149, § 105A (c)(2)(i) (West); § 6:25. State Efforts to Combat Pay Inequity, Essential Facts: Employment.

disclosure.”⁶⁸ The second situation is after an offer of employment, complete with compensation and benefits packages, has been made to the applicant.⁶⁹ After the offer is made, all employers are allowed to seek the employee’s prior salary.⁷⁰

Employees, or applicants, whose rights under MEPA have been violated have three years to file a claim, and two options to do so; first, they can file a complaint with the Attorney General’s Office.⁷¹ If an applicant files with the AG’s office, the office has the discretion to determine if further action in the case is appropriate.⁷² If it finds further action appropriate, then it “may file a claim in court on behalf of one or more employees.”⁷³ Applicants have a second option of filing under a private right of action on their own behalf or on behalf of similarly-situated employees.⁷⁴ The two options are completely independent of each other, employees or applicants can choose one or both at any time before the three year statute of limitations has run.⁷⁵

⁶⁸ *AG Guidance Letter*, *supra* note 28, at 14.

⁶⁹ Mass. Gen. Laws Ann. ch. 149, § 105A (West); *AG Guidance letter*, *supra* note 28, at 13.

⁷⁰ Mass. Gen. Laws Ann. ch. 149, § 105A (West)(c)(2)(i).

⁷¹ Mass. Gen. Laws Ann. ch. 149, § 105A(b) (West); *AG Guidance Letter*, *supra* note 28, at 16.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *AG Guidance Letter*, *supra* note 28, at 16-17.

An employer who is found to have violated MEPA can be held liable for both lost wages and double damages.⁷⁶ Employers could also be found liable for attorney's fees and other court costs in egregious situations.⁷⁷ Given the potential for double damages, the Massachusetts legislature has also included in MEPA a "safe harbor" for employers who conduct a good faith self-evaluation of pay practices and demonstrate reasonable progress toward eliminating gender-based wage differentials.⁷⁸ This "reasonable progress on remedying gender-based wage differentials may serve as a bar to liquidated damages."⁷⁹

B. California: The Biggest

As the most populous state in the United States, containing approximately twelve percent of the country's population, California pay equity laws arguably govern the most employers and employees in the country.⁸⁰ Expanding on California's Fair Pay Act, the California legislature passed Assembly Bill 168 ("AB 168").⁸¹ Effective January 1, 2018, the

⁷⁶ *Id.* at 15.

⁷⁷ Mass. Gen. Laws Ann. ch. 149, § 105A(b) (West); *AG Guidance Letter*, *supra* note 28, at 15.

⁷⁸ Renee Inomata, *Massachusetts Pay Equity Law Bans Salary History Inquiry, and So Much More*, THE IN-HOUSE ADVISOR (Apr. 19, 2018), <http://www.in-houseadvisor.com/2018/04/19/massachusetts-pay-equity-law-bans-salary-history-inquiry-and-so-much-more/>.

⁷⁹ *Id.*

⁸⁰ Derick Moore, *Texas Added the Most People but California Still Most Populous*, THE UNITED STATES CENSUS BUREAU (Jan. 16, 2018), <https://www.census.gov/library/stories/2018/01/state-pop-tableau.html>.

⁸¹ Cal. Lab. Code § 432.3 (West); Leigh A. White, *California Labor and Employment Law: Tips to Prepare for 2018*, ORANGE COUNTY LAW 36 (April 2018),

bill adds a prohibition on inquiries into prior pay history of job applicants to section 432.3 of the California Labor Code.⁸² The legislative history behind the bill is especially enlightening to the fact that the bill was conceived on the presumption that compensation based on pay history perpetuates unequal wages between men and women.⁸³

AB 168 prohibits all employers, regardless of public or private sector, from (1) relying on an applicant's history of pay (including benefits) when offering employment and (2) seeking salary history information from applicants orally, in writing, directly or indirectly, through an agent or other actor.⁸⁴ It further places an affirmative requirement on employers to provide a pay scale for the position upon an applicant's reasonable request.⁸⁵

Like Massachusetts, California has an exception for situations where salary information that is voluntarily disclosed by an applicant; in these situations, employers are permitted to rely on the information to make employment and salary

https://www.cdflaborlaw.com/_images/content/Reprint_OC_Lawyer_Apr_2018_White_LoRes_Revised.pdf.

⁸² *Id.*

⁸³ See Nestor Barrero, Sayaka Karitani, and Jade Brewster, *Quote No More*, L.A. LAW. 22, 27 (May 2018), <http://www.lacba.org/docs/default-source/lal-magazine/2018-test-articles/may2018testarticle.pdf>.

⁸⁴ Cal. Lab. Code § 432.3 (a)-(b) (West).

⁸⁵ Jeffrey Wortman and Christopher Im, *California Attempts to Clarify Salary History Ban Legislation*, CALIFORNIA PECULIARITIES EMPLOYMENT LAW BLOG (July 19, 2018), <https://www.calpeculiarities.com/2018/07/19/california-attempts-to-clarify-salary-history-ban-legislation/> (The meaning of "reasonable request" was further clarified in AB 2282 to be limited to after the initial interview with the applicant).

decisions.⁸⁶ Voluntarily disclosed information in California must be given by an applicant “voluntarily and without prompting.”⁸⁷

AB 168 expressly notes that a violation will not be a misdemeanor and therefore no criminal penalties will apply.⁸⁸ Civil penalties, although not provided for in the statute, also seem to be an available means of remedy.⁸⁹

In reaction to some confusion created by the legislation, California Governor Jerry Brown signed AB 2282 on July 18, 2018.⁹⁰ AB 2282 clarified that employers are still permitted to ask for an applicant’s salary expectations.⁹¹

C. Oregon: The Strongest

On June 1, 2017, Governor Kate Brown signed the Oregon Equal Pay Act (“OEPA”), after it had been passed unanimously by both houses.⁹² The legislation expanded on Oregon’s

⁸⁶ *Id.*

⁸⁷ 2017 Update, Cal. Prac. Guide Employment Litigation Highlights ch. 11 sec. 1054 (West).

⁸⁸ Cal. Lab. Code § 432.3 (d) (West).

⁸⁹ Nestor Barrero, Sayaka Karitani, and Jade Brewster, *Quote No More*, L.A. LAW. 24 (May 2018), available at <http://www.lacba.org/docs/default-source/lal-magazine/2018-test-articles/may2018testarticle.pdf>.

⁹⁰ Jeffrey Wortman and Christopher Im, *California Attempts to Clarify Salary History Ban Legislation*, CALIFORNIA PECULIARITIES EMPLOYMENT LAW BLOG (July 19, 2018), <https://www.calpeculiarities.com/2018/07/19/california-attempts-to-clarify-salary-history-ban-legislation/>.

⁹¹ *Id.*

⁹² Oregon Equal Pay Act of 2017 sec. 2, § 652.220(1)(d), https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orla

preexisting laws protecting individuals from gender discrimination in workplace compensation, taking effect on January 1, 2019, with enforcement scheduled to begin on October 6, 2019.⁹³

Like its counterpart in Massachusetts, OEPA applies expansively to all employers, public or private, large or small, with the exception of the Federal Government.⁹⁴ The act requires employers to neither (1) “screen job applicants based on current or past compensation” nor (2) “determine compensation for a position based on current or past compensation of a prospective employee.”⁹⁵ While other states have similarly focused on screening for or requesting salary histories, Oregon’s protection of job applicants has gone further.⁹⁶ Employers in Oregon are expressly banned from

w0197.pdf; see Cody Emily Schvaneveldt, *Oregon Enacts New Equal Pay Law that Includes Salary History Inquiry Restrictions*, LITTLER ASAP (June 1, 2017), <https://www.littler.com/publication-press/publication/oregon-enacts-new-equal-pay-law-includes-salary-history-inquiry>.

⁹³ Jenna Reed, *Oregon’s Equal Pay Act Signed Into Law*, CASCADE EMPLOYERS ASSOCIATION (June, 2017), <https://www.cascadeemployers.com/alert-2017-06a>.

⁹⁴ *Id.*

⁹⁵ Oregon Equal Pay Act of 2017 sec. 2, § 652.220(1)(d), https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orlaw0197.pdf; Or. Rev. Stat. Ann. § 652.220 (West).

⁹⁶ *Oregon Equal Pay Act of 2017: Oregon Bans Employers from Asking Job Applicants About Prior Salary*, 131 HARV. L. REV. 1513, available at <https://harvardlawreview.org/2018/03/oregon-equal-pay-act-of-2017/> [hereinafter *-Oregon Bans Employers from Asking Job Applicants About Prior Salary*].

using pay history information from any source in their hiring decisions.⁹⁷

The biggest strength of OEPA is the absence of any exception for salary histories freely disclosed by applicants.⁹⁸ Employers are only allowed to verify salary history information after an offer has been made to the applicant which includes compensation and the applicant has authorized the employer to confirm their salary history.⁹⁹

Employees or applicants who have had their rights under OEPA violated will have two paths to file a claim. The first is by filing a complaint with the Bureau of Labor and Industries (“BOLI”), in which the commissioner has full discretion for review; the second is through a private action, in which class action claims are permitted.¹⁰⁰ There is no exhaustion requirement that an individual must file with the BOLI before bringing a private claim, nor are the two actions mutually exclusive.¹⁰¹

Employers are potentially liable for both compensatory damages, in the form of back pay, and punitive damages, if the

⁹⁷ Or. Rev. Stat. Ann. § 652.220 (West).

⁹⁸ *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96.

⁹⁹ Mark Crabtree, *Oregon Enacts Expansive Pay Equity Law*, JACKSON LEWIS (June 15, 2017), <https://www.jacksonlewis.com/publication/oregon-enacts-expansive-pay-equity-law>.

¹⁰⁰ Jenna Reed, *Oregon’s Equal Pay Act Signed Into Law*, CASCADE EMPLOYERS ASSOCIATION (June 2017), <https://www.cascadeemployers.com/alert-2017-06a>.

¹⁰¹ Schvaneveldt, *supra* note 93.

employer engaged in fraud, willful or wanton misconduct, acts with malice, or is a repeat offender.¹⁰²

OEPA includes a safe harbor defense similar to Massachusetts where employers can show good faith by conducting a pay equity analysis and showing reasonable efforts to eliminate disparities.¹⁰³ Unlike MEPA, however, the safe harbor is not a complete defense to violations of OEPA.¹⁰⁴ The safe harbor only entitles the employer to file a motion to disallow compensatory or punitive damages; however, the judge will be the ultimate arbiter.¹⁰⁵

III. Critique of New Jersey Executive Order 1

A. New Jersey's Executive Order 1

In its 2016-2017 sessions, the New Jersey legislature presented proposals prohibiting salary history inquiries as a matter of law and passed a bill in both chambers.¹⁰⁶ Governor Chris Christie failed to sign that bill into law and it died on his desk.¹⁰⁷ Subsequent proposals have been filed, however, and Christie's successor, Governor Phil Murphy, has stated that he is

¹⁰² Oregon Equal Pay Act of 2017 § 9(4)(a)-(b); see Schvaneveldt, *supra*, note 93.

¹⁰³ Oregon Equal Pay Act of 2017 § 12; see Crabtree, *supra* note 100.

¹⁰⁴ Crabtree, *supra* note 100.

¹⁰⁵ Schvaneveldt, *supra* note 93.

¹⁰⁶ Aaron Crews, *You're Gonna Need A Bigger Boat: Pay Equity Initiatives Flood the State Legislatures*, LITTLER INSIGHT (Feb. 14, 2018), <https://www.littler.com/publication-press/publication/youre-gonna-need-bigger-boat-pay-equity-initiatives-flood-state>.

¹⁰⁷ *Id.*

inclined to enact a salary history ban into law if given the chance.¹⁰⁸

Governor Murphy did not wait for the legislature to act and instead took matters into his own hands just hours after being sworn in as New Jersey's 56th Governor on January 16th, 2018.¹⁰⁹ As his first official act as Governor, Murphy signed Executive Order #1: Promoting Equal Pay, Gender Equality ("EO1").¹¹⁰ He announced that in signing the executive order;

"New Jersey takes the first meaningful step towards gender equity and fighting the gender pay gap," and "begin[s] the process of bulldozing the roadblocks that have kept women from being paid fairly, that have kept many women of color from fulfilling their dreams of entering the middle class, and that have allowed our wage gap to persist."¹¹¹

¹⁰⁸ Matt Arco, *Phil Murphy signs executive order on equal pay for women*, NJ.COM (Jan. 17, 2018), https://www.nj.com/politics/index.ssf/2018/01/phil_murphy_to_sign_executive_order_on_equal_pay_f.html (quoting Gov. Murphy who stated that he "would make it state law" if the legislature presented him with a salary history bill that covered private employers).

¹⁰⁹ Sarah Wieselthier, *Equal Pay and Gender Equality are No. 1 on N.J.'s New Governor's Agenda*, FISHERPHILLIPS.COM (Jan. 17, 2018), <https://www.fisherphillips.com/pay-equity-blog/equal-pay-and-gender-equality-are-no>.

¹¹⁰ Executive Orders, THE OFFICIAL WEBSITE FOR THE STATE OF NEW JERSEY, (<https://nj.gov/infobank/eo/056murphy/> last visited Nov. 4, 2018).

¹¹¹ *Governor Murphy signs Executive Order Promoting Equal Pay, Gender Equity*, STATE OF THE NEW JERSEY OFFICE OF THE GOVERNOR, https://nj.gov/governor/news/news/562018/approved/20180116a_eo.shtml (last visited Nov. 4, 2018).

Executive Order #1 applies only to state employers.¹¹²

These entities are prohibited from “[inquiring] about a job applicant’s current or previous salary.”¹¹³ Inquiries into public records databases or inquiries to previous employers are also prohibited.¹¹⁴ Further, employers must “take all reasonable measures to avoid inadvertently discovering salary history data while gathering other information about the applicant.”¹¹⁵ Should an employer learn of prior salary history information despite its efforts not to, the employer will be forbidden from using that information in the making of any employment decisions.¹¹⁶

Like other states, New Jersey has three exceptions for when employers may inquire about the salary history of an applicant. The first is if federal, state, or local law requires verification of such information prior to a conditional offer of

¹¹² N.J.A.C. Exec. Order No. 1 §1 (2018). Section 9 of the order further elaborates that a state entity includes principal departments of the Executive Branch of the State Government, any agencies or bodies created by those departments and any independent State authority over which the Governor exercises executive control. This excludes the Federal government as an employer covered by the order. N.J.A.C. Executive Order No. 1 §9 (2018).

¹¹³ N.J.A.C. Exec. Order No. 1 §1 (2018).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ N.J.A.C. Exec. Order No. 1 §2 (2018); N.J.A.C. Exec. Order No. 1 §5 (2018) (Section 5 of the Order goes into detail regarding the specific instance where an employer may already be aware of the applicant’s compensation issue prior to the date of this Order taking effect. In that circumstance, an employer shall still be banned from using such information “unless required to by law or collective bargaining agreement.”).

employment.¹¹⁷ The second is in situations where an applicant has voluntarily provided such information.¹¹⁸ An employer may not, however, use in any employment decisions an applicant's refusal to volunteer salary history information.¹¹⁹ Third, the ban is lifted once employers make an offer of employment with compensation.¹²⁰

EO1 provides one sole "remedy" when applicants are improperly asked questions regarding pay history information. Applicants may report such instances to the Governor's Office of Employee Relations.¹²¹ Upon receiving a complaint, the Governor's office "shall investigate the allegation and take appropriate remedial measures," which are not elaborated on further in the text of the Order.¹²² The Order itself does not create a private right of action for applicants and expressly points out that it should not be taken as such.¹²³

B. Strengths

New Jersey's Executive Order has three main strengths in relation to similar prohibitions on salary history questions. First, the ban is a state initiative rather than one that is only

¹¹⁷ N.J.A.C. Exec. Order No. 1 §4 (2018).

¹¹⁸ N.J.A.C. Exec. Order No. 1 §3-4 (2018).

¹¹⁹ N.J.A.C. Exec. Order No. 1 §3 (2018).

¹²⁰ N.J.A.C. Exec. Order No. 1 §1 (2018).

¹²¹ N.J.A.C. Exec. Order No. 1 §7 (2018).

¹²² *Id.*

¹²³ N.J.A.C. Exec. Order No. 1 §8 (2018) (It should be noted that since the Order fails to provide a private cause of action for applicants, it has no opportunity to be reviewed by the courts unless a constitutional or procedural claim arises against it).

applicable to certain localities.¹²⁴ Second, the scope of the inquiry prohibition extends to publicly available information and imposes a reasonable duty on employers to avoid discovery.¹²⁵ And third, the timeline for the Order's enactment from start to finish was just sixteen days.¹²⁶

EO1 as a state ban is beneficial simply because its effects and protections span across the entire state of New Jersey, treating all individuals the same. This consistency is a benefit that individual city ordinances cannot provide. Although this note does not analyze any of the local ordinances, it is important to note that San Francisco, New York City, New Orleans, Pittsburgh, and Philadelphia¹²⁷ have all enacted prohibitions on

¹²⁴ *Governor Murphy signs Executive Order Promoting Equal Pay, Gender Equity*, STATE OF THE NEW JERSEY, https://nj.gov/governor/news/news/562018/approved/20180116a_eo.shtml (last visited Nov. 4, 2018).

¹²⁵ N.J.A.C. Exec. Order No. 1 §2 (2018).

¹²⁶ See N.J.A.C. Exec. Order No. 1 §10 (2018) (Governor Murphy signed the order on January 16th, 2018 and the order took effect on Feb. 1, 2018).

¹²⁷ *Chamber of Commerce for Greater Phila. v. City of Phila.*, 319 F. Supp. 3d 773, 812 (E.D. Pa. 2018) (Philadelphia's legislation was challenged by the Philadelphia Chamber of Commerce who claimed that the ban violated free speech and obstructed interstate commerce without proof that it would have a tangible effect to improve pay equity. In April of 2018, the Eastern District of Pennsylvania agreed and struck down part of the law. The Court found the ban of salary history questions unconstitutional, but it left intact the part of the ordinance that prohibit employers from relying on salary history in hiring decisions.); See First Amended Complaint, *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. June 13, 2017); See also Erin Connell and Kathryn G. Mantoan, *Mind The Gap: Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data*, 33 ABA JOURNAL LAB. & EMP. LAW 1, 12.

salary history inquiries.¹²⁸ While these local authorities are taking positive steps toward gender equality, local ordinances can be confusing or openly contradictory in ways that counter their effectiveness.¹²⁹ Local ordinances are also sometimes seen as “ineffective and therefore purely symbolic,” whereas state actions are viewed with a greater sense of democratic legitimacy.¹³⁰ A statewide ban provides the type of consistency that is necessary to bring about the socio-economic change that Governor Murphy spoke of as the purpose of EO1.¹³¹

Another strength of EO1 is the wide scope of the ban, as it even prohibits inquiries into publicly available information. The Massachusetts AG’s Office has implied that public information should not be used, and Oregon’s ban broadly prevents relying on salary history information from anywhere.¹³² But the legislation in Massachusetts, Oregon, and California does not expressly prohibit this inquiry like the New Jersey order does. This proscription is especially critical in New Jersey because state salaries are publicly available, leaving any current state employee wishing to secure a new state job vulnerable to pay discrimination based on her previous salary that is available to

¹²⁸ Madison Alder, Amazon, BofA, Join Employers That Won’t Ask for Pay History, BLOOMBERG (Jan. 30, 2018), <https://www.bna.com/amazon-bofa-join-n73014474798/>.

¹²⁹ Robert Salem, *The Strengths and Weaknesses of Local Human Rights Ordinances*, 48 CLEV. ST. L. REV. 61, 64 (2000), available at <http://engagedscholarship.csuohio.edu/clevstlrev/vol48/iss1/9>.

¹³⁰ *Id.*

¹³¹ See Governor Murphy Signs Historic, Sweeping Pay Legislation, STATE OF NEW JERSEY (Apr. 24, 2018), https://nj.gov/governor/news/news/562018/approved/20180424a_equalpay.shtml

¹³² AG Guidance Letter, *supra* note 28, at 14; OR. REV. STAT. ANN. § 652.220 (West).

her new employer at the click of a button.¹³³ EO1 not only keeps employers from searching public records but has gone further than some of its counterparts by imposing an affirmative, but reasonable, duty on employers to avoid discovery.¹³⁴

The last place where the New Jersey Order shines in its efficient timeframe for enactment. Signed on January 16th, 2018, Governor Murphy did not need to wait for the legislature to draft, vote and pass through each house, a bill for him to sign.¹³⁵ Governor Murphy brought his vision to life in a matter of hours after being sworn into office.¹³⁶ Although New Jersey does not have a history of partisanship on this issue,¹³⁷ the Executive Order was an efficient way for the Governor to enact his initiative quickly without relying on the legislature to act first.¹³⁸ Just sixteen days after Governor Murphy took his oath and pledged to work to close the gender wage gap for women in New

¹³³ Public Payroll, STATE OF NEW JERSEY TRANSPARENCY CENTER, <https://nj.gov/transparency/payroll/> (last visited Nov. 5, 2018).

¹³⁴ N.J.A.C. Exec. Order No. 1 §2 (2018).

¹³⁵ N.J.A.C. Exec. Order No. 1 §10 (2018).

¹³⁶ Sarah Wieselthier, *Equal Pay and Gender Equality are No. 1 on N.J.'s New Governor's Agenda*, FISHER PHILLIPS (Jan. 17, 2018), <https://www.fisherphillips.com/pay-equity-blog/equal-pay-and-gender-equality-are-no>.

¹³⁷ Aaron Crews, *You're Gonna Need A Bigger Boat: Pay Equity Initiatives Flood the State Legislatures*, LITTLER INSIGHT (Feb. 14, 2018), <https://www.littler.com/publication-press/publication/youre-gonna-need-bigger-boat-pay-equity-initiatives-flood-state>.

¹³⁸ John Duncan, *ARTICLE: A CRITICAL CONSIDERATION OF EXECUTIVE ORDERS: GLIMMERINGS OF AUTOPOIESIS IN THE EXECUTIVE ROLE*, 35 VT. L. REV. 333, 342 (Winter, 2010) (“The process by which the President may issue an executive order remains considerably more efficient than that which is necessary to pursue legislation in Congress.”).

Jersey, state employers were no longer allowed to inquire about job applicants' previous salaries.¹³⁹

C. Weaknesses

The obvious initial weakness of the New Jersey ban is that it applies only to state employers. According to 2016 data from the United States Census Bureau, there were more than 231,000 active "employer establishments" in New Jersey.¹⁴⁰ There are approximately 231,973 employers in New Jersey who remain free to inquire into and rely on the salary history information provided by a job applicant.¹⁴¹ Further, there are about 4.5 million women in New Jersey, yet only about 37,000¹⁴² are employed by the state.¹⁴³ That leaves over 4,475,00 New Jersey women subject to salary history questions and vulnerable to pay discrimination should they choose to seek private employment.

Even among the 37,000 women employed by the state for which this order applies, there are a few barriers to maximize its impact on the gender wage gap. First, employers will still be able

¹³⁹ N.J.A.C. Exec. Order No. 1 §10 (2018).

¹⁴⁰ *QuickFacts New Jersey*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/nj/LFE041216#viewtop> (last visited Nov. 5, 2018).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, PEW RESEARCH CENTER (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>. (The statistics here are specific to women because women are typically disadvantaged by the gender wage gap and that is the focus of this note, but it is critical to acknowledge that wage gaps also very prominent in regard to all people of color and other minorities).

to inquire about an applicant's salary after they have made an offer of employment with set compensation.¹⁴⁴ An employer who learns he offered to pay someone much more than what she was previously making may take that into account when considering future raises and bonuses. It may also impact the employer's impression of the applicant, potentially causing resentment. Even if the employer does not let the information impact the employee's pay, an employer may still create a negative work environment. And while allowing employers to check salary histories once they hire an applicant doesn't seem to offer practical business benefits, it does serve the important purpose of making the ban a time, place and manner restriction and prevent First Amendment challenges like those that plagued the Philadelphia ban.¹⁴⁵

The Order also does not protect applicants who volunteer their salary history.¹⁴⁶ A carve out for voluntary disclosure may be the exception that swallows the rule if it encourages applicants to disclose with the impression that it may help them get the job. Or perhaps the carve out will only hurt individuals who were not successful in negotiating their initial salaries, leaving men, and perhaps some women who are already established, free to disclose confidently while others hide behind the law as their reason for not disclosing.¹⁴⁷ Further, employers

¹⁴⁴ N.J.A.C. Exec. Order No. 1 §1 (2018).

¹⁴⁵ See William Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum -- Manner of Restriction*, 71 A.L.R.6TH 471, 3, 13. (2012) (Speech is subject to reasonable time, place and manner restrictions and there are many situations in which civil restrains on speech have been held to not be unconstitutional).

¹⁴⁶ See N.J.A.C. Exec. Order No. 1 §3-4 (2018).

¹⁴⁷ Nestor Barrero, Sayaka Karitani & Jade Brewster, *Quote No More*, LOS ANGELES LAWYER 22, 27 (May 2018), <http://www.lacba.org/docs/default-source/lal-magazine/2018-test-articles/may2018testarticle.pdf>. (This concept is portrayed best in the

may come up with more subtle ways to get applicants to volunteer this information, for example, making lowball offers assuming that applicants will speak up and say how much more they were making previously.¹⁴⁸ The employer then, either knows the person's salary history, or can assume that he or she was making around that low-ball offer and even get away with offering that low salary.¹⁴⁹

The drafters of EO1 foresaw this problem and expressed that employers may not take into consideration an applicant's lack of voluntary disclosure in their decisions,¹⁵⁰ but as human beings making economic decisions it is unrealistic to reasonably expect employers to do this. An applicant who voluntarily discloses may seem more honest or cooperative to the employer. Employers may be unable to make employment decisions objectively if they instinctively trust the disclosing applicant more. Research has shown that women who do not disclose receive slightly lower offers, while men who do not disclose receive slightly higher offers.¹⁵¹ It is also men who are more

entertainment industry where a lot of the work is based on payment quotes. "Well established talent may more freely volunteer compensation information," because of the good negotiating position it will put them in. But where does that leave developing talent? It may create a pressure to voluntarily disclose in order to comply with the custom and quickly establish a quote that fits the project.).

¹⁴⁸ Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/business/economy/salary-history-laws.html>.

¹⁴⁹ *Id.*

¹⁵⁰ N.J.A.C. Exec. Order No. 1 §3 (2018).

¹⁵¹ *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96.

likely to confidently disclose their salaries, regardless of whether it can be considered or not.¹⁵²

There is further concern that taking away a tool for employers to use in their hiring and compensation decisions will actually force them to rely on gender stereotypes and expectations more.¹⁵³ This phenomenon, called “statistical discrimination,” potentially expands the gender wage gap when employers, without knowing how much women previously made, assume they made less than men.¹⁵⁴ Determinations like this based on gender are illegal but not absent in society,¹⁵⁵ and the less straightforward information that employers can use to base their decisions on, the more likely they are to lean on discrimination.¹⁵⁶

¹⁵² *America’s Women and the Wage Gap*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES (Sept. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>; see *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96.

¹⁵³ Scheiber, *supra* note 149.

¹⁵⁴ *Id.*

¹⁵⁵ See Kim Parker, Juliana Menasce Horowitz & Renee Stepler, *On Gender Differences, No Consensus on Nature vs. Nurture*, PEW RESEARCH CENTER (Dec. 5, 2017), <http://www.pewsocialtrends.org/2017/12/05/on-gender-differences-no-consensus-on-nature-vs-nurture/>.

¹⁵⁶ *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96, at 1519 (A small case study can be done on this topic in regard to the “ban the box” movement, prohibiting employers from asking job applicants about their criminal history. After the implication of this policy, “the black-white gap in employer callback rates grew six-fold” as employers potentially associated people of color with people with criminal records.).

Eliminating an employer's reliance on salary history may also encourage more negotiation between an employer and an applicant to the detriment of women applicants. Negotiation is a learned skill in which women notoriously do not get the same results as their male counterparts.¹⁵⁷ When women approach the negotiation table, which research shows they are doing just as often as men,¹⁵⁸ they undervalue themselves,¹⁵⁹ are less assertive than their male counterparts,¹⁶⁰ and end up being

¹⁵⁷ SYMPOSIUM: Women, Unions, and Negotiation, 14 NEV. L.J. 465, 475.

¹⁵⁸ Benjamin Artz, Amanda Goodall, & Andrew Oswald, *Research: Women Ask for Raises as Often as Men, but Are Less Likely to Get Them*, H. BUS. REV. (June 25, 2018), available at <https://hbr.org/2018/06/research-women-ask-for-raises-as-often-as-men-but-are-less-likely-to-get-them>.

¹⁵⁹ *How Women Undervalue Themselves at Work*, MANAGING CHANCE (Mar. 17, 2017), <https://www.managingchange.org.uk/news-and-views/how-women-undervalue-themselves-at-work> (In one study, women undervalued their performances consistently by almost 42%, in another, women paid themselves 28% less than their male counterparts for the same work); John Jost, *Women Undervalue Themselves in Setting Pay Rates*, STANFORD GRADUATE SCHOOL OF BUSINESS (Aug. 1, 1998), <https://www.gsb.stanford.edu/insights/john-jost-women-undervalue-themselves-setting-pay-rates>.

¹⁶⁰ Emily T. Amanatullah and Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women's Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, VOL. 98, NO. 2, 256–267 (2010), available at <http://gap.hks.harvard.edu/negotiating-gender-roles-gender-differences-assertive-negotiating-are-mediated-women%E2%80%99s-fear-backlash> (One study found that women concede more quickly in negotiations and are hesitant to take on aggressive negotiation traits that are seen to be not feminine for fear of backlash).

penalized for violating social norms of being “friendly and agreeable.”¹⁶¹

Another significant weakness of EO1 is that it does not create a private cause of action.¹⁶² Instead, the sole remedy for a violation of the order is a reporting avenue to the Governor’s office.¹⁶³ This places the violation in the hands of a body with a requirement to investigate and take “appropriate remedial measures,” the likes of which are not elaborated on.¹⁶⁴ This ambiguous sanction could be overlooked by employers who are faced with the reality that they can get away with paying women less. The lack of a private right also notably decreases the chances that the executive order will be subject to judicial review. Courts respect when executive orders are silent to judicial review, so without an expressed private right, individuals will not have ability to take the violation before a court.¹⁶⁵ Individuals may, however, be able to bring constitutional or procedural claims to get the executive order before a judge.¹⁶⁶

IV. Recommendations

¹⁶¹ Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011).

¹⁶² N.J.A.C. Exec. Order No. 1 §7 (2018).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Kevin Stack, Article, *The Statutory President*, 90 IOWA L. REV. 539, 552 (2005).

¹⁶⁶ Procedural claims will also have limited standing opportunities due to the lack of procedural requirements for executive orders which require no notice and comment.

A. New Jersey Substantive Recommendations

There are four specific amendments to Executive Order 1 that could strengthen the New Jersey ban on salary history questions: 1) extend its scope to private employers, or at least to state contractors and anyone receiving state funding; 2) remove the exception for salary information which is voluntarily disclosed; 3) include expressed prohibitions on multiple methods of soliciting salary history information; and 4) provide a private cause of action for applicants.

Scope.

Expanding the scope of the ban to private employers would protect the job applicants at more than 230,000 private employers in New Jersey.¹⁶⁷ Massachusetts,¹⁶⁸ California,¹⁶⁹ and Oregon,¹⁷⁰ covers all employers statewide regardless of public or private sector status, and legislation in many other states

¹⁶⁷ *QuickFacts New Jersey*, UNITED STATES CENSUS BUREAU, available at <https://www.census.gov/quickfacts/fact/table/nj/LFEO41216#viewtop> (last visited Nov. 5, 2018).

¹⁶⁸ MASS. GEN. LAWS ANN. ch. 149, § 105A (West).

¹⁶⁹ CAL. LAB. CODE § 432.3 (a)-(b) (West).

¹⁷⁰ Oregon Equal Pay Act of 2017 sec. 2, § 652.220(1) (West).

including Delaware,¹⁷¹ Connecticut,¹⁷² Washington,¹⁷³ and Vermont,¹⁷⁴ do as well. Salary history should not stand in the way of earning a fair and equal salary for more than four million New Jersey women if they choose to seek private sector employment.¹⁷⁵

If New Jersey is not able to expand the scope of a salary history ban to private employers, it should at least be able to extend the scope to entities that are quasi-public, like state contractors and organizations that accept state funding.¹⁷⁶

Removing the Exception.

It may be necessary to allow employers to inquire about salary history information after an offer of employment and compensation has been made. This would ensure that the question ban is a time, place and manner restriction, which would be less subject to first amendment challenges like those

¹⁷¹ DEL. CODE ANN. tit. 19, § 709B (2017); see Joon Hwang, *Delaware Enacts Law to Address Gender Pay Gap By Prohibiting Employers From Requesting Compensation History of Job Applicants*, LITTLER ASAP (June 19, 2017), <https://www.littler.com/publication-press/publication/delaware-enacts-law-address-gender-pay-gap-prohibiting-employers>.

¹⁷² C.G.S.A. § 31-40Z.

¹⁷³ WEST'S RCWA 49.002.011.

¹⁷⁴ VT. STAT. ANN. tit. 21, § 495m.

¹⁷⁵ See Patten, *supra* note 144.

¹⁷⁶ 1 EDUCATION LAW § 5.01 (2018) (LEXIS) (State governments have similarly conditioned educational funds, requiring specific programing or activities from educational institutions which receive state funding).

that plagued the Philadelphia ban.¹⁷⁷ But EO1 does not need to include an exception for voluntarily disclosed information. Following the Oregon model, New Jersey could ensure that employers do not rely on salary history information regardless of applicants' voluntary disclosure.¹⁷⁸ At a minimum, the salary history ban should be amended to include language explaining that employers are prohibited from asking an applicant to voluntarily disclose.¹⁷⁹

One researcher studying disclosed salary histories found that women who did not disclose their salary histories were offered 1.8% less pay than women who did.¹⁸⁰ Her analysis is critical, however, because she offers two theories to explain this dilemma: First, she hypothesizes that women who do not disclose their salary send a signal to the employer that they want to negotiate which employers view more negatively;¹⁸¹ second, she proposes that employers will, consciously or not, assume

¹⁷⁷ See William Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum -- Manner of Restriction*, 71 A.L.R.6TH 471, 3, 13 (2012) (Speech is subject to reasonable time, place and manner restrictions and there are many situations in which civil restraints on speech have been constitutionally upheld. All conditions on employers are only permissible as long as they do not violate a constitutional right. Maintaining the ban on questions only until after an offer of employment with compensation package has been made will likely continue to pass constitutional muster as a time, place and manner restriction, because it does not wholly restrict the speech content.).

¹⁷⁸ *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96.

¹⁷⁹ See *AG Guidance Letter*, *supra* note 28, at 13.

¹⁸⁰ Frank, *supra* note 22

¹⁸¹ *Id.* (Notably the problem of sending a signal for a desire to negotiate is not viewed negatively when done by male applicants).

that women who do not disclose make a low salary.¹⁸² Both of these hypotheses revolve around the idea that employers have an unconscious bias, and that when applicants volunteer their salary information, it makes employers more comfortable with them. Allowing an exception for voluntarily disclosed information will not change that expectation, but not allowing an employer to use that information under any circumstances will. If employers cannot rely on salary information, regardless of if it is voluntarily offered, they may not hold it against applicants who do not disclose. Considering that women are the applicants who get blamed for not disclosing, and for whom not disclosing can even harm their chances of getting an optimal offer,¹⁸³ this could have a monumental impact on New Jersey equal pay initiatives.

Expressed Prohibitions.

By prohibiting employers from seeking salary history information through a number of different means, other states have established a clear expectation of compliance with the salary history ban. New Jersey's Executive Order would benefit from these same limitations. EO1 should be amended to preclude inquiries orally or in writing, directly or indirectly as the California statute does.¹⁸⁴ It should also borrow from the New York City model which extends the prohibition to any advertising, applications, or interviews for the position.¹⁸⁵ Finally, EO1 should include a provision from the Massachusetts legislation which prohibits employers from seeking wage history

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ CAL. LAB. CODE § 432.3 (a)-(b) (West).

¹⁸⁵ *Salary History Questions During Hiring Process are Illegal in NYC*, NYC HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/media/salary-history.page> (last viewed Sept. 30, 2018).

through an agent, and from asking the applicants to voluntarily disclose the information.¹⁸⁶

Private Action.

Enforcement of the law creates social control by “manipulating access to valued social resources or by threatening to deliver sanctions.”¹⁸⁷ New Jersey could further strengthen its salary inquiry ban by creating a private cause of action for applicants. Massachusetts,¹⁸⁸ California,¹⁸⁹ and Oregon,¹⁹⁰ all provide private causes of action for individuals with the opportunity to collect civil penalties up to double lost wages and even punitive damages.¹⁹¹ New Jersey’s private right of action should include recovery for lost wages and back pay as well as liquidated damages in the amount of back pay. Further, to maximize enforcement, New Jersey should follow the Oregon model which makes punitive damages available if the employer engaged in fraud, willful or wanton misconduct, acted with malice, or is a repeat offender.¹⁹²

¹⁸⁶ *AG Guidance Letter*, *supra* note 28 at 13.

¹⁸⁷ Tom Tyler, *Why People Obey the Law*, YALE UNIVERSITY PRESS, 21 (1990), http://www.psych.nyu.edu/tyler/lab/Chapters_1-4.pdf.

¹⁸⁸ *AG Guidance Letter*, *supra* note 28, at 14.

¹⁸⁹ Barrero, Karitani, & Brewster, *supra* note 148.

¹⁹⁰ OR. REV. STAT. ANN. § 652.220 (1) (West 2017).

¹⁹¹ See Oregon Equal Pay Act of 2017 sec. 9(4)(a)-(b), https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orlaw0197.pdf; Schvaneveldt, *supra* note 93.

¹⁹² See Oregon Equal Pay Act of 2017 sec. 9(4)(a)-(b) https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orlaw0197.pdf; see also Schvaneveldt, *supra* note 93.

“Appropriate remedial measures” at the hands of the Governor’s office,¹⁹³ which is the only relief provided by EO1, just doesn’t seem to have the same bite as potential punitive damages, which may have a better deterrent effect.¹⁹⁴

B. New Jersey Procedural Recommendations

EO1 was an efficient way for Governor Murphy to accomplish a quick policy win but this type of initiative needs to be passed through the legislative process to strengthen its democratic legitimacy and give it the enforcement power it needs to be effective.¹⁹⁵

The New Jersey Legislature could adopt the ban by passing it through as its own bill or pass a bill adding a ban on salary history questions into the Dianne B. Allen Equal Pay Act (“the Act”).¹⁹⁶ Either way, it would have greater democratic legitimacy than as an executive order.

If New Jersey chooses to add the salary question ban to the Dianne B. Allen Equal Pay Act, it would quickly expand the scope of the ban into some recommended areas and strengthen its enforcement.

¹⁹³ N.J.A.C. Exec. Order No. 1 §7 (2018).

¹⁹⁴ See Thomas Koeing, Symposium, *A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 738, 750 (2008) (Punitive damages may also be uniquely appropriate here because they have enough flexibility to address individual circumstances and behavior that is not otherwise deterred by criminal law but has serious long-lasting effects on the lives of many women).

¹⁹⁵ Christopher J. Peters, *Adjudication As Representation*, 97 COLUM. L. REV. 312, 320 (1997).

¹⁹⁶ Dianne B. Allen Equal Pay Act §. 11(a) (2018).

Senator Dianne B. Allen was the original New Jersey senator who proposed and negotiated for an equal pay act.¹⁹⁷ She was motivated by her experiences in 1994 when she left her job and filed gender and age discrimination complaints with the Equal Opportunity Employment Commission.¹⁹⁸ Senator Allen retired from the Senate in January of 2018 and the bill she fought so hard for was passed and named after her four months later.¹⁹⁹ Governor Phil Murphy signed the Dianne B. Allen Equal Pay Act on April 24th, 2018, in recognition of Equal Pay Day.²⁰⁰

Adding salary history questions to the Dianne B. Allen Equal Pay Act would serve to immediately apply the prohibition to private employers, state contractors, and public bodies that provide qualifying services.²⁰¹ This would account for countless more employers and protect thousands more job applicants and employees, giving these newly covered applicants and employees a much stronger remedy in the case of wage discrimination. Violations of the Act would create a private cause of action, and employers making illegal inquiries into

¹⁹⁷ Neoma Ayala, *NJ Passes Diane B. Allen Equal Pay Act*, COLE SCHOTZ BLOG (Apr. 4, 2018), <https://www.csemploymentblog.com/2018/04/articles/employment-policies-and-practi/nj-passes-diane-b-allen-equal-pay-act/>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Governor Murphy Signs Historic, Sweeping Equal Pay Legislation, STATE OF NEW JERSEY, https://nj.gov/governor/news/news/562018/approved/20180424a_equalpay.shtml (last visited Nov. 7, 2018).

²⁰¹ Dianne B. Allen Equal Pay Act §11(a) (2018); see New Jersey Legislature Passes New Pay Equity Bill, NAT. L. REV. (April 17, 2018), <https://www.natlawreview.com/article/new-jersey-legislature-passes-new-pay-equity-bill>.

salary histories would be subject to the same civil risks.²⁰² That private action also can extend to retaliation actions.²⁰³ A private claim for retaliation could be relevant in the salary history disclosure aspect in a situation where an employer realizes it is paying a woman much more than she was making in her previous position.

The last benefit of adding the salary history question ban to the Dianne B. Allen Equal Pay Act would be to have it apply to multiple areas of discrimination beyond race and gender. The Act emphasizes the need for pay equality regardless of other factors such as sexual orientation, age, marital status, disability, pregnancy and more which are all protected classes for whom protection from salary history questions could be beneficial.²⁰⁴

C. National Recommendation

There are currently several federal laws in place to address equal pay: Equal Pay Act of 1963;²⁰⁵ Civil Rights Act of 1964;²⁰⁶ and the Lilly Ledbetter Fair Pay Act of 2009.²⁰⁷ However, none of these statutes currently make it illegal to (1) ask job applicants or their previous employers for salary history information, (2) screen applications based on salary history

²⁰² See Section 12 of Pub. L. No. 1945, c.169 (C.10:5-13).

²⁰³ *Id.*; see also Ayala, *supra* note 199.

²⁰⁴ Dianne B. Allen Equal Pay Act §11(a) (2018).

²⁰⁵ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006 & Supp. V 2011)).

²⁰⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011)).

²⁰⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (2006 & Supp. V 2011)).

information, or (3) require applicants to disclose their salary histories to be considered for the position.²⁰⁸

In May 2017, the U.S. House of Representatives proposed the Pay Equity for All Act.²⁰⁹ This act would have amended the Fair Labor Standards Act of 1938²¹⁰ to make it illegal for any employer to “request or require . . . that a prospective employee disclose previous wage or salary histories.”²¹¹ The bill had strong support from the ACLU and NAACP,²¹² but was not considered or voted on by the House Education and the Workforce Committee charged with its review.²¹³ In January 2019, the congressional session ended, the proposed Pay Equity for All Act expired, and the 116th Congress must look to new legislation for review.²¹⁴

²⁰⁸ State and Local Salary History Bans, Practical Law Practice Note w-005-9410; Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/publications/brochure-equal_pay_and_ledbetter_act.cfm (last visited Nov. 11 2018).

²⁰⁹ H.R. 2418, 115th Cong. (2017); see *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 96.

²¹⁰ 29 U.S.C. §§ 201–219 (2012).

²¹¹ *Oregon Bans Employers from Asking Job Applicants About Prior Salary*, *supra* note 97.

²¹² *Id.* at 1516, n.32.

²¹³ H.R. 2418: *Pay Equity for All Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr2418> (follow the “details” hyperlink).

²¹⁴ See generally *When a New Congress Begins*, United States Senate https://www.senate.gov/general/Features/WhenaNewCongressBegin_s_display.htm (last viewed Jan. 23 2019).

While state and local initiatives are relatively effective in the small scale, a national ban on salary history questions would be a much more efficient way to address this systemic problem. A national law with broad scope and no exception for voluntarily disclosed salary information that prohibits multiple methods of soliciting salary history information and creates a private cause of action for applicants would serve to close the national gender wage gap.²¹⁵

A law created with bicameralism and presentment at the national level would carry substantive democratic legitimacy,²¹⁶ impact more people than would legislation in individual states and create consistency for multi-state employers and employees.

Whether or not the new Congress passes a salary history ban in a broad pay equity initiative, or a narrow bill focused only on salary history questions, a national prohibition on salary history inquiries would be a great step towards gender pay equity.

V. Conclusion

Using salary histories to determine wages hurts women; since women typically make less money than men, for many reasons, the gender wage gap continues on and widens when employers set salaries based on previous levels. As evident from

²¹⁵ See Graf, Brown, & Patten, *supra* note 5 (In 2017, the national average pay for women was 82 cents on the dollar of a white man).

²¹⁶ Christopher J. Peters, *Adjudication As Representation*, 97 COLUM. L. REV. 312, 320 (1997); See Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 265 (1997) (“law is the vehicle by which democracy operates; it is the expression of democratic ideals or choices.”).

early research in California²¹⁷ and Massachusetts,²¹⁸ these salary history bans can be an effective way for New Jersey Legislators to promote pay equity, but the current state of the New Jersey ban does not cover enough women nor does it create a sufficient remedy to address one of the systemic problems behind the gender wage gap.

The salary history ban imposed by New Jersey Executive Order 1 will only bind state employers, leaving more than 230,000 employers in New Jersey free to rely on the salary history information,²¹⁹ and over 4,475,00 New Jersey women subject to salary history questions and vulnerable to pay discrimination in private employment.²²⁰ Because of that restriction alone, the impact of the ban is not likely to be as successful as the one in place in California.²²¹

The proposed recommendations to New Jersey Executive Order 1 will offer greater protections to a greater number of women. Applying the ban to private employers would provide a remedy for more than 4.4 million New Jersey women.²²² More than 4.4 million women being paid based truly on merit and not prior salary would be a huge step closer to the elimination of the gender wage gap.

²¹⁷ *Early Evidence From California's Salary History Ban* supra note 34.

²¹⁸ Frank, *supra* note 22.

²¹⁹ *QuickFacts New Jersey*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/nj/LFEO41216#viewtop> (last visited Nov. 5, 2018).

²²⁰ See Patten, *supra* note 144.

²²¹ See generally *Early Evidence From California's Salary History Ban*, supra note 34.

²²² See Patten, *supra* note 144.

A national salary history ban, if it has as much success as has been found in the California ban, could close the national gender wage gap by 5 percent, leaving women at 87 cents for every dollar a white man makes.²²³ This increase is equivalent to an additional \$2,000 annually for a woman making \$40,000 a year. That is \$2,000 closer to a stronger economy; \$2,000 closer to financial security for millions of women; \$2,000 closer to gender wage equity.

²²³ See *Early Evidence From California's Salary History Ban*, supra note 34.