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

Abigail Cook*

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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. Sleeman lost out of more than $10,000 in pay and retirement benefits in the short five years she worked for that company. Unfortunately, Kerri Sleeman’s situation is not unique; almost all working women are impacted by the gender wage gap.

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. In the 1980s the gap was upwards of thirty-five cents on the dollar, but has narrowed to about an eighteen-cent difference. 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.

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

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.


6 Id.
equal pay until close to 2119. Women of color face an even greater pay disparity, with Black women making sixty-three cents, Native American women making fifty-seven cents, and Hispanic women making fifty-four cents on the white man’s dollar.

Women in New Jersey do not fare much better. In 2016, men made 1.36 times more than women in the same jobs. 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. 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. 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.”

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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-yx3gIVQz0MCh0Vvg0VEAAYASAAEglt7fD_BwE.


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 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.).


11 Id.

12 Id.

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. Women who are not financially secure are less likely to be homeowners and more likely to have stress over loans. 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.” For the eighty percent of black women who are the sole or primary breadwinners for their families, 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. The gender wage gap even disadvantages the U.S. economy, to the amount of about $4.3 trillion according to one study.

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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%.


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).
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 information and forty-one percent discouraged it. 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. Society in the United States is generally uncomfortable with women asking for money or asserting themselves in the public sphere. 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 continue paying them poorly based on previous discriminatory wages.

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; Second, men

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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).


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

may be more inclined (and able) to take “career risks” that will benefit their salary in the long run.  

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.”

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. Their absence from the workforce can leave them with less experience 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. 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. 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.” New Jersey is one of those states; in January of 2018 Governor Phil Murphy signed Executive Order #1: Promoting Equal Pay, Gender Equality (“EO1”). This executive order prohibits state employers from

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26 Id.


30 Id.

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

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.”

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. 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. Research into California’s ban is important for two reasons beyond just acknowledging success in closing the gender wage gap. First, the change in earnings was predominantly from male-dominated industries. 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. Second, the ban did not appear to cause any men or women to enter or exit the labor market. 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.


Id. at 4.

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

Id. at 12.


Id. at 20-21.
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.” Not disclosing salaries will also ensure wages are based on job-relevant criteria like qualifications, responsibilities and market factors.

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. In that study, researchers randomly assigned a group of employers to be aware of job applicants’ prior wages, while another group of employers was unaware. The employers that were unaware of salary histories were more likely to call back and hire applicants who had lower salary histories. Another survey done by a compensation data and software company, PayScale, found the opposite conclusion. 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.” 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.

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

40 Frank, supra note 22.

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


43 Id. at 6, 10.

44 Id. at 16, 21-22.

45 Frank, supra note 22..

46 Id.

candidate's pay history, even though no legal restriction prohibits them from doing so.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{51} This may be particularly relevant in industries, like entertainment, that rely heavily on “quotes” for jobs based on past performance.\textsuperscript{52}

Legislatures in over forty jurisdictions have taken action; considering more than 100 bills in twenty-three states.\textsuperscript{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.\textsuperscript{54} Massachusetts was the first state to pass an equal pay law that takes aim at the use of salary histories in hiring decisions.\textsuperscript{55}

A. Massachusetts: The First\textsuperscript{56}

\textsuperscript{48} Madison Alder, Amazon, BofA, Join Employers That Won’t Ask for Pay History, BLOOMBERG (Jan. 30, 2018), available at \url{https://www.bna.com/amazon-bofa-join-n73014474798/}.

\textsuperscript{49} Id.

\textsuperscript{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 \url{http://www.latimes.com/business/la-fi-salary-history-workplace-law-20171116-story.html}.

\textsuperscript{51} Id.


\textsuperscript{53} Id.

\textsuperscript{54} Id., supra note 48.

\textsuperscript{55} Id.

\textsuperscript{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), \url{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
In August of 2016, Massachusetts became the first state to address salary history questions with legislation. Governor Charlie Baker signed The Act to Establish Pay Equity (“MEPA”), which amended the previous Pay Equity Law. On July 1, 2018, the bipartisan act took effect, clarifying what constitutes unlawful wage discrimination and adding protections to ensure greater equity for workers. 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.

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.” 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. Salary information cannot be sought or provided by a recruiter, job placement service or any agent of the employer. 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.

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


63 Id.

64 Id. at 14.
Employers in Massachusetts are allowed to ask applicants about their expected salaries. 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.

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

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. If an applicant files with the AG’s office, the office has the discretion to determine if further action in the case is appropriate. If it finds further action appropriate, then it “may file a claim in court on behalf of one or more employees.” Applicants have a second option of filing under a private right of action on their own behalf or on behalf of similarly-situated employees. 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.

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65 Id. at 13-14.
72 Id.
73 Id.
74 Id.
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 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

76 Id. at 15.
79 Id.
82 Id.
indirectly, through an agent or other actor. It further places an affirmative requirement on employers to provide a pay scale for the position upon an applicant’s reasonable request.

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

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

In reaction to some confusion created by the legislation, California Governor Jerry Brown signed AB 2282 on July 18, 2018. AB 2282 clarified that employers are still permitted to ask for an applicant’s salary expectations.

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. The legislation

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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).
86 Id.
88 Cal. Lab. Code § 432.3 (d) (West).
91 Id.
expanded on Oregon’s 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 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


94 Id.


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


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 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 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

101 Schvaneveldt, supra note 93.
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.
107 Id.
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

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


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).


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

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. 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. 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.

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

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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).
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).
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 Philadelphia have all enacted prohibitions on salary history inquiries. 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. Local ordinances are also sometimes seen as “ineffective and therefore purely symbolic,” whereas state actions are viewed with a greater sense of democratic legitimacy. 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.

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. 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 her new employer at the click of a button. EO1 not only keeps employers from searching

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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.


130 *Id.*


public records but has gone further than some of its counterparts by imposing an affirmative, but reasonable, duty on employers to avoid discovery.\textsuperscript{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.\textsuperscript{135} Governor Murphy brought his vision to life in a matter of hours after being sworn into office.\textsuperscript{136} Although New Jersey does not have a history of partisanship on this issue,\textsuperscript{137} the Executive Order was an efficient way for the Governor to enact his initiative quickly without relying on the legislature to act first.\textsuperscript{138} Just sixteen days after Governor Murphy took his oath and pledged to work to close the gender wage gap for women in New Jersey, state employers were no longer allowed to inquire about job applicants’ previous salaries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} Further, there are about 4.5 million women in New Jersey, yet only about 37,000\textsuperscript{142} are employed by the

\textsuperscript{134} N.J.A.C. Exec. Order No. 1 §2 (2018).
\textsuperscript{135} N.J.A.C. Exec. Order No. 1 §10 (2018).
\textsuperscript{138} John Duncan, \textit{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.”).
\textsuperscript{139} N.J.A.C. Exec. Order No. 1 §10 (2018).
\textsuperscript{140} QuickFacts New Jersey, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/nj/LFE041216#viewtop (last visited Nov. 5, 2018).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
That leaves over 4,475,000 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 to inquire about an applicant's salary after they have made an offer of employment with set compensation. 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.

The Order also does not protect applicants who volunteer their salary history. 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. Further, employers may come up with more subtle ways to get applicants to volunteer this information, for example, making lowball offers assuming

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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).


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 restraints on speech have been held to not be unconstitutional).


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 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.)
that applicants will speak up and say how much more they were making previously.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{151} It is also men who are more likely to confidently disclose their salaries, regardless of whether it can be considered or not.\textsuperscript{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.\textsuperscript{153} This phenomenon, called “statistical discrimination,” potentially expands the gender wage gap when employers, without knowing how much women previous made, assume they made less than men.\textsuperscript{154} Determinations like this based on gender are illegal but not absent in society,\textsuperscript{155} and the less straightforward information that employers can use to base their decisions on, the more likely they are to lean on discrimination.\textsuperscript{156}

\begin{footnotes}
\footnotetext[149]{Id.}
\footnotetext[150]{N.J.A.C. Exec. Order No. 1 §3 (2018).}
\footnotetext[151]{\textit{Oregon Bans Employers from Asking Job Applicants About Prior Salary}, supra note 96.}
\footnotetext[153]{Scheiber, supra note 149.}
\footnotetext[154]{Id.}
\footnotetext[156]{\textit{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}
\end{footnotes}
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. When women approach the negotiation table, which research shows they are doing just as often as men, they undervalue themselves, are less assertive than their male counterparts, and end up being penalized for violating social norms of being “friendly and agreeable.”

Another significant weakness of EO1 is that it does not create a private cause of action. Instead, the sole remedy for a violation of the order is a reporting avenue to the Governor’s office. 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. 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 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.).

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


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).


163 Id.

164 Id.
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. Individuals may, however, be able to bring constitutional or procedural claims to get the executive order before a judge.

IV. Recommendations

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. Massachusetts, California, and Oregon covers all employers statewide regardless of public or private sector status, and legislation in many other states including Delaware, Connecticut, Washington, and Vermont do as well. Salary history should not


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.


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

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


172 C.G.S.A. § 31-40Z.

173 WEST’S RCWA 49.002.011.

174 VT. STAT. ANN. tit. 21, § 495m.
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.  

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.

**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 that plagued the Philadelphia ban. 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. 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.

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. 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; second, she proposes that employers will, consciously or not, assume that women who do not

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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).

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).
disclose make a low salary.\textsuperscript{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,\textsuperscript{183} this could have a monumental impact on New Jersey equal pay initiatives.

\textit{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.\textsuperscript{184} It should also borrow from the New York City model which extends the prohibition to any advertising, applications, or interviews for the position.\textsuperscript{185} Finally, EO1 should include a provision from the Massachusetts legislation which prohibits employers from seeking wage history through an agent, and from asking the applicants to voluntarily disclose the information.\textsuperscript{186}

\textit{Private Action.}

Enforcement of the law creates social control by “manipulating access to valued social resources or by threatening to deliver sanctions.”\textsuperscript{187} New Jersey could further strengthen its salary inquiry ban by creating a private cause of action for applicants. Massachusetts,\textsuperscript{188} California,\textsuperscript{189} and Oregon,\textsuperscript{190} all provide private causes of action for

\begin{footnotesize}
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} CAL. LAB. CODE § 432.3 (a)-(b) (West).
\textsuperscript{186} AG Guidance Letter, supra note 28 at 13.
\textsuperscript{187} Tom Tyler, Why People Obey the Law, YALE UNIVERSITY PRESS, 21 (1990), http://www.psych.nyu.edu/tyler/lab/Chapters_1-4.pdf.
\textsuperscript{188} AG Guidance Letter, supra note 28, at 14.
\textsuperscript{189} Barrero, Karitani, & Brewster, supra note 148.
\textsuperscript{190} OR. REV. STAT. ANN. § 652.220 (1) (West 2017).
\end{footnotesize}
individuals with the opportunity to collect civil penalties up to double lost wages and even punitive damages. 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.

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.

“Appropriate remedial measures” at the hands of the Governor’s office, 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.

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.

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”). 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.

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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).


Senator Dianne B. Allen was the original New Jersey senator who proposed and negotiated for an equal pay act. 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. 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. Governor Phil Murphy signed the Dianne B. Allen Equal Pay Act on April 24, 2018, in recognition of Equal Pay Day.

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. 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 salary histories would be subject to the same civil risks. That private action also can extend to retaliation actions. 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 then 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 beneficial.


198 Id.

199 Id.


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

C. National Recommendation

There are currently several federal laws in place to address equal pay: Equal Pay Act of 1963, Civil Rights Act of 1964, and the Lilly Ledbetter Fair Pay Act of 2009. 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 information, or (3) require applicants to disclose their salary histories to be considered for the position.

In May 2017, the U.S. House of Representatives proposed the Pay Equity for All Act. This act would have amended the Fair Labor Standards Act of 1938 to make it illegal for any employer to “request or require . . . that a prospective employee disclose previous wage or salary histories.” The bill had strong support from the ACLU and NAACP, but was not considered or voted on by the House Education and the Workforce Committee charged with its review. 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.

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

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


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

212 Id. at 1516, n.32.


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 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

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 Legimacy 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.”).

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

218 Frank, supra note 22.


220 See Patten, supra note 144.

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

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. 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.

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See Patten, supra note 144.

See Early Evidence From California’s Salary History Ban, supra note 34.